Supreme Court, U.S.
FILED
06-151 JUL 26 2006
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

Bernard L. Rottschaefer, M.D.,
Petitioner

v.

United States of America

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Is a physician denied a fair trial in a criminal prosecution for drug distribution under 21 U.S.C. §841(a)(1) when the parties frame and argue the issues under a Government interpretation of the "legitimate medical purpose" rule of 21 C.F.R. §1306.04 that equates the criminal standard ("outside the course of professional practice") with the civil "standard of care"?

2.

Has the circuit court's factors test to evaluate new trial motions under Rule 33 supplanted the language of the Rule so as to deny a new trial even when the interest of justice requires it?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bernard L. Rottschaefer, M.D., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the Third Circuit Court of Appeals (Pet. App. 1a-13a) was designated "not precedential" and is unreported.

JURISDICTION

The court of appeals entered its judgment on April 27, 2006. Pet. App. 14a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The crime of unlawful distribution of a controlled substance is codified at 21 U.S.C. §841(a)(1), which is set out in the appendix at Pet. App. 20a. Other relevant portions of the Controlled Substances Act (21 U.S.C. §801 *et seq.*) (CSA) are set out in the appendix at Pet. App. 16a-20a. The "legitimate medical purpose" regulation, 21 C.F.R. §1306.04, is set out in the appendix at Pet. App. 21a-22a.

STATEMENT OF THE CASE

A. Trial in the Western District of Pennsylvania

This is a criminal case arising out of the Western District of Pennsylvania. The district court had jurisdiction pursuant to 18 U.S.C. §3231.

Dr. Rottschaefer is a physician who practiced internal medicine in his own office at the time of the

events at issue. He is board certified by the American Board of Internal Medicine and is board certified in forensic medicine. Dr. Rottschaefer was charged with 208 counts of unlawfully distributing controlled substances to five female patients.

1. The Government's case

At trial, four of the five patients (Jennifer Riggle, Sue Leskovic, Amy Vivio, and Pammy Miller) testified that they were drug abusers who exchanged sexual favors for prescriptions with Dr. Rottschaefer. The defense introduced evidence that called each of those allegations into doubt. However, the jury was not required to determine the credibility of those patients and their allegations to convict, because the Government has repeatedly insisted that this case is not about "sex for drugs" and that the alleged exchanges are not the criminal conduct at issue.

The Government argued for conviction based on deficient medical practices, as defined by the Government's standard of care expert. In the Government's view, the crime of unlawful distribution of controlled substances is proved by lack of a legitimate medical purpose when issuing a prescription.[1]

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[1] *See, e.g.*, Trial Transcript at App. 94-97:

> "District Court: * * * [T]he government's case is this. He was prescribing drugs in exchange for sex. That's the government's case. *I mean, this is not a medical malpractice claim.*
>
> * * * * *
>
> "Prosecutor: Your Honor, I'd like to object to that. We do not have the requirement to prove motive.
>
> "While we are discussing motive, the case in and of itself – just the prescribing for no

The prosecution elicited evidence that four of the patients (Riggle, Leskovic, Vivio, and Miller) were seeing Dr. Rottschaefer to get prescriptions for drugs they abused. The women testified that they made up stories or exaggerated their pain to justify their need for the prescriptions. The Government criticized Dr. Rottschaefer for not ordering diagnostic tests, referring the women to specialists, or prescribing different medications to them. See, Appellee's Brief 11, 16, 18, 20. The fifth patient, Corey Schlemmer, who did not allege that she traded sexual favors for prescriptions, truthfully complained of migraine pain and received prescriptions for OxyContin, but testified that she became addicted to the drug and eventually used street drugs to satisfy her addiction. The Government argued that a poor treatment plan for Schlemmer proved the lack of a legitimate medical purpose, which in turn proved the crime. See, App 97, App 617-18.

The Government also elicited testimony from a Drug Enforcement Administration (DEA) agent and from an expert witness, Dr. Clough, that based on their reviews of Dr. Rottschaefer's patient charts, the charts did not justify issuance of the prescriptions. Therefore, in

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legitimate medical reason is a crime.

"* * * * *

"We don't need to prove the sex.

"* * * * *

"Our expert will say, as he has said in his opinion, there is no legitimate medical reason to put these women on these super drugs for all these months under range of motion exercises * * *. *The crime is the issuance of the prescription for no legitimate medical reason.*" App. 94-97 (emphases added).

The citation "App." refers to the Appendix filed in the Third Circuit. By contrast, the citation "Pet. App." refers to the Appendix to this petition.

the Government's view, Dr. Rottschaefer's medical practices as reflected in his patient charts failed to show a legitimate medical purpose for issuing the prescriptions, and thus the issuance of the prescriptions constituted unlawful drug distribution.

2. The defense's case

Similarly, Dr. Rottschaefer's trial attorneys defended the case as though the quality of medical practices controlled. Dr. Rottschaefer's defense attorneys focused on guidelines for treatment and dosing, standards of practice, and the quality of Dr. Rottschaefer's treatment practices. *See, e.g.*, App 640-728 (direct examination of Dr. Rottschaefer on medical practices and patient charts).[2]

The defense showed that Dr. Rottschaefer, then a 61-year old physician, had been practicing medicine since 1972 and had more than 14,000 hours' experience in emergency medicine. Dr. Rottschaefer is published, and had served on several medical committees. The challenged prescriptions were not for large quantities of medications, and Dr. Rottschaefer kept detailed charts. Each of the challenged prescriptions was for an appropriate dosage of the medication under the standards of the Physicians Desk Reference and Pennsylvania law. Dr. Rottschaefer testified that each prescription was justified by the patient's medical complaint and his medical diagnosis. Moreover, each woman testified either that the prescriptions were issued for her medical complaints and did treat her problem (see, App. 242-43, 252 (Vivio), 484-86 (Miller), 503-06, 531 (Schlemmer)), or that she lied about her pain to induce Dr. Rottschaefer to

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[2]The Government continued to share that focus, cross-examining Dr. Rottschaefer on proper practices, physicians' minimum practice standards in the Pennsylvania state code, and insurance requirements for exams. *E.g.*, App 729-749, 797, 806-07.

prescribe pain medication (see, App 182-83 (Riggle), 549-51, 585-86 (Leskovic)).

The defense also presented evidence to disprove the allegations that Dr. Rottschaefer was having sexual relations with the patients. Dr. Rottschaefer denied those allegations on the stand. Jennifer Riggle told a fellow inmate, Deborah Peterson, that she fabricated her allegations of exchanging sexual favors for prescriptions. Pammy Miller could not say whether Dr. Rottschaefer was circumcised, despite claiming to have performed fellatio and masturbation on him. Each of the four women who testified to such allegations initially told police that she did not have sexual activity with Dr. Rottschaefer, but later changed her story and testified to the sexual allegations as part of a plea agreement with the Government, under which she received Government concessions in her own criminal case.

3. The jury's verdict

On March 9, 2004, the jury found Dr. Rottschaefer guilty of 153 counts of unlawful drug distribution.

B. Motion for new trial in district court

After trial, substantial evidence from Riggle herself, showing that Riggle had fabricated her allegations and perjured herself, was discovered.

Eight months after Dr. Rottschaefer's conviction, in November 2004, Riggle's former boyfriend Barron Shelton was released from prison. During the two and one-half years preceding Dr. Rottschaefer's trial, Riggle had mailed 72 handwritten letters (consisting of a total of 529 pages) to Shelton in prison, in which she detailed her plan to testify to fabricated allegations that she traded sexual favors for drugs with Dr. Rottschaefer, in exchange for an agreement with the Government for a lighter sentence on five counts of unlawful drug delivery. Just before Dr. Rottschaefer's trial began, Riggle wrote to Shelton for the last time and told him she was in love

with another man. Within days of Shelton's release from prison in November 2004, Shelton delivered all of Riggle's correspondence to Dr. Rottschaefer's attorneys.

Dr. Rottschaefer moved for a new trial based on that newly discovered evidence. In January 2005, without awaiting responsive pleadings and without a hearing, the district court denied Dr. Rottschaefer's motion. The district court ruled that the newly discovered evidence was merely impeaching, because the letters themselves were hearsay, and was merely cumulative, because a witness at trial (Peterson) testified that Riggle confided that she was fabricating the allegations that she traded sexual favors for prescriptions. The court thus held that the discovery of Riggle's letters did not warrant a new trial.

C. Appeal in the Third Circuit Court of Appeals

Dr. Rottschaefer appealed, arguing that prosecutorial misconduct and ineffective assistance of counsel--each committed when the prosecutor and the defense attorneys applied the civil standard of care as the criminal standard--denied him a fair trial. Although the Government defended its framing of the case as a proper interpretation of the "legitimate medical purpose" regulation of 21 C.F.R. §1306.04, Dr. Rottschaefer argued that, in fact, unlawful drug distribution under 21 U.S.C. §841(a) does not have a "legitimate medical purpose element," and that the Government's argument under the regulation effectively establishes the civil standard of care as the criminal conviction standard. Dr. Rottschaefer likened the Government's interpretation to criminalizing malpractice and argued that the Government committed prosecutorial misconduct under *Berger v. United States*, 295 U.S. 78 (1935),[3] by improperly casting the civil standard of care as the

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[3]*Berger* was overruled on other grounds by *Stirone v. United States*, 361 U.S. 212 (1960).

criminal conviction standard throughout the trial. Dr. Rottschaefer further argued that his defense attorneys were ineffective for failing to identify and object to the Government's erroneous interpretation and for improperly defending him under that interpretation.

Dr. Rottschaefer filed a letter of supplemental authorities, pursuant to Federal Rule of Appellate Procedure 28(j), in which he argued that this Court's recent decision in *Gonzales v. Oregon*, 546 U.S. __, 126 S.Ct. 904 (2006), supported his position. Dr. Rottschaefer argued:

> "*Gonzales* rebukes the government's attempts to import any additional meaning from the regulation into the CSA. 126 S.Ct. at 915-16. * * *.
>
> "*Gonzales* rebuts the government's argument that there is a legitimacy 'element' at all. The crime is prescribing 'outside the course of professional practice,' which simply means ceasing to act as a physician and acting instead as a mere 'drug pusher' as 'conventionally understood.' *Id.* at 922-23, citing *United States v. Moore*, 423 U.S. 122, 143 (1975)."

Dr. Rottschaefer also appealed from the denial of his motion for a new trial. Dr. Rottschaefer argued that he should be afforded a new trial based on the evidence of perjury discovered after the verdict, under the "interest of justice" standard articulated in *Mesarosh v. United States*, 352 U.S. 1, 14 (1956), and provided in Federal Rule of Criminal Procedure 33. Dr. Rottschaefer argued that the district court erred when it ruled that Riggle's letters were merely cumulative or impeaching, because the letters were exculpatory and because confronting Riggle with the letters on the stand would produce overwhelming evidence of a different quality than the evidence offered through Peterson. The Third Circuit consolidated the appeals.

The Government responded to Dr. Rottschaefer's first argument by asserting that Dr. Rottschaefer's argument ignored the "legitimate medical purpose element" of the crime. Appellee's Brief 33-39. In the Government's view, the crime is proved by evidence that the physician issued a prescription without a legitimate medical purpose. Appellee's Brief 35 ("There was really only one issue at Rottschaefer's trial: whether he prescribed the drugs in question for a legitimate medical purpose"); Appellee's Brief 36 ("21 U.S.C. [sic: C.F.R.] §1306.04(a) [is] the regulation that governs this case"). Therefore, the Government reasoned, the parties properly tried the case by focusing on the quality of Dr. Rottschaefer's medical practices and the standard of care.

By the same logic, the Government contended that the evidence of perjury did not warrant a new trial, because the case was not tried on, and did not depend on, evidence that Dr. Rottschaefer exchanged prescriptions for sexual favors. While it conceded that the letters would have "undermine[d] Riggle's credibility" and "aided Rottschaefer's claim that he and Riggle never had sex," the Government argued that "would not have made a difference," because "Rottschaefer was *not* charged with having sex with his patients." Appellee's Brief 46, 51 (emphasis in original). Rather, the Government argues,

> "[Rottschaefer] was charged with prescribing narcotics without a 'legitimate medical purpose.' Without question, sex was an important part of the government's case. It provided Rottschaefer with a motive to commit the crime. The government need not prove motive, however, to win a case. * * *. Whether or not Rottschaefer had sex with his patients, he still could be convicted under the CSA." Appellee's Brief 51-52 (internal citations omitted).

According to the Government, the issuance of the

prescriptions was not illegal because they were traded for sexual favors; it was illegal because the prescriptions were issued without appropriate tests, X-rays, referral to specialists, review of other medical records, and other evidence of deficient medical practices that showed a lack of "legitimate medical purpose." Appellee's Brief 54.[4] Therefore, the Government concluded, the newly discovered evidence controverting Riggle's sex-for-drugs allegations did not call the verdict into question.

The Third Circuit Court of Appeals rejected Dr. Rottschaefer's challenges. Although Dr. Rottschaefer relied heavily on this Court's recent decision in *Gonzales v. Oregon* at oral argument, the Third Circuit did not address or cite *Gonzales* in its opinion.

The Third Circuit began with the question of statutory interpretation:

> "Physicians are exempt from [21 U.S.C. § 841(a)(1)]to the extent that they act lawfully, *see United States v. Moore*, 423 U.S. 122, 131 (1975), but they are subject to criminal liability when their drug prescribing and dispensing activities fall 'outside the usual course of professional practice,' *id.* at 124. The CSA's implementing regulations provide that, to be effective, a prescription 'must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice,' and that a person who knowingly issues an ineffective prescription 'shall be subject to the penalties provided for violations of the

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[4]The deviations from the standard of care argued by the Government were characterized as such by the Government's standard of care expert witness, Dr. Clough. Dr. Rottschaefer denied at trial, and continues to deny, that he violated the civil standard of care.

> provision of law relating to controlled substances.' 21 C.F.R. § 1306.04(a). Thus, the regulations clearly state that prescribing drugs for other than a 'legitimate medical purpose' is a basis for criminal liability under the CSA." Pet. App. 4a (emphasis added).

The Third Circuit found additional support for its interpretation in the case law of the Fourth, Fifth, Sixth, and Tenth Circuit Courts, which either implicitly or explicitly have relied on 21 C.F.R. §1306.04 to import the regulatory language ("legitimate medical purpose") into the statute. Pet. App. 4a-6a. Because the Third Circuit concluded that the statutory crime is proved by proof of a lack of "legitimate medical purpose," it held that "the prosecution acted well within the law when it defined Rottschaefer's crimes in terms of prescribing narcotics for 'no legitimate medical purpose.'" Pet. App. 6a. The Third Circuit likewise held that Dr. Rottschaefer's trial attorneys were not ineffective. Pet. App. 6a.

Regarding Dr. Rottschaefer's motion for new trial, the Third Circuit agreed with the district court that Riggle's handwritten letters were merely cumulative and impeaching. The Third Circuit rejected Dr. Rottschaefer's argument that the letters were exculpatory, reasoning, as did the Government, that the theory behind Dr. Rottschaefer's convictions was not that he traded prescriptions for sexual favors, but that his prescription practices themselves were illegal. Pet. App. 9a. The Third Circuit further reasoned that, because fellow inmate Peterson testified that Riggle told Peterson that she lied about having sexual encounters with Dr. Rottschaefer, the detailed evidence of fabrication in the letters "might have been more compelling than Peterson's testimony" but "would not have added any new facts to the jury's calculus, and is therefore 'merely cumulative.'" Pet. App. 10a-11a. Finally, the Third Circuit reiterated its belief that the jury's verdict was not based on a theory that Dr. Rottschaefer traded prescriptions for sexual

favors, and concluded that the letters did not carry a probability of affecting the verdict. Pet. App. 11a-12a.

The Third Circuit affirmed Dr. Rottschaefer's convictions, and remanded for resentencing in light of *United States v. Booker*, 543 U.S. 220 (2005).

REASONS FOR GRANTING THE PETITION

On the first question presented, this case involves the criminalization of alleged malpractice and the importance of, "limiting criminality * * * to reach only those with the level of 'culpability * * * we usually require in order to impose criminal liability.'" *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005), quoting *United States v. Aguilar*, 515 U.S. 593, 602 (1995).

This case is a counterpart to *Gonzales v. Oregon*, 546 U.S. ___, 126 S.Ct. 904 (2006).[5] In *Gonzales*, the Government used the "legitimate medical purpose" regulation of 21 C.F.R. §1306.04 to claim an extraordinary grant of power, to establish a national standard of care that precluded writing prescriptions for Schedule II controlled substances under Oregon's Death With Dignity Act. In this case, the Government interprets the regulation to establish the community standard of care, as defined by the Government's expert, as the conviction standard. Although this Court held in *Gonzales* that the regulation does nothing more than parrot other statutory language, the Government uses that regulation to relieve itself of its burden of proving that a physician's conduct is "outside the course of professional practice," an element of the offense of unlawful distribution of a controlled substance by a physician.

The Government does that by interpreting the regulatory language "without a legitimate medical

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[5]Dr. Rottschaefer's counsel also served as counsel of record for the physician and the pharmacist in *Gonzales v. Oregon*.

purpose" to mean something other than the statutory language "outside the course of professional practice." Under the Government's interpretation, the regulatory language has a meaning akin to the civil "standard of care": adherence to generally accepted medical practices. The Government thus establishes as its burden of proof a mere deviation from the civil standard of care.

This Court, however, has interpreted "outside the course of professional practice" to mean ceasing to act as a physician, and acting instead as a drug pusher or drug dealer, as conventionally understood.

The Government, through its interpretation of the legitimate medical purpose regulation, has completely relieved itself of the obligation to prove criminal drug dealing in a physician prosecution. Under the Government's construction, it can (and does) argue for conviction on evidence that may not even prove civil negligence, much less criminal drug dealing.

The second question presented, whether strict application of the Third Circuit's factors test for a motion for a new trial negates the intent of Rule 33, presents an important question about the administration of justice.

It is undeniable that the allegations of a sex-for-drugs exchange, if true, provide a valid basis for conviction: if Dr. Rottschaefer was trading drugs for sexual favors, he was intentionally acting outside the course of professional practice. It is also undeniable that the jury may have based its verdict on those allegations; the grounds for the jury's verdict are unknown. Even if the jury considered those allegations only as motive, the jury would have given the evidence great weight. Dr. Rottschaefer moved for a new trial after discovering substantial evidence of personal letters hand-written by Riggle, detailing her plan to fabricate the allegations that she traded sexual favors for drugs and to perjure herself at Dr. Rottschaefer's trial. Riggle did in fact testify to the fabricated allegations at trial. The second question presented is whether the Third Circuit's conclusion that the letters were merely cumulative and impeaching and thus did not warrant a new trial curtailed the analysis

into whether the interests of justice required a new trial in light of that evidence.

As a final introductory note, Dr. Rottschaefer counters the Third Circuit's suggestion that his challenges are really about the sufficiency of the evidence. See Pet. App. 3a n 1. That is not the issue. The legal issues presented are that the Government argued one invalid legal theory, and presented perjured testimony to prove a valid second legal theory.

I. May the crime of unlawful distribution of controlled substances be defined by the "legitimate medical purpose" regulation and equated with a violation of the civil standard of care?

A. Statutory elements of the crime of unlawful distribution of a controlled substance

In a prosecution against a state-licensed physician registered with the DEA and therefore authorized to distribute controlled substances, the crime of unlawful distribution of a controlled substance has three elements: the physician

(1) knowingly or intentionally
(2) distributes or dispenses a controlled substance
(3) outside the course of professional practice.

21 U.S.C. §§ 802(21), 841(a);[6] *Moore*, 423 U.S. at 140.

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[6]It is a crime to (1) knowingly or intentionally (2) distribute or dispense a controlled substance unless "authorized" by the CSA. 21 U.S.C. §841(a). Authorization is obtained by "registering" with the Attorney General. See 21 U.S.C. §822(a)(2). Physicians and pharmacists licensed by a state and registered with the Attorney General are "practitioners" and are authorized to dispense controlled substances (see 21 U.S.C. § 829(a)&(b)) in "the course of professional practice." See 21 U.S.C. § 802(21); *see also, Moore*, 423 U.S. at 140.

Drug distribution prosecutions against physicians with DEA authorization to prescribe controlled substances turn on the first and third elements: whether the physician "knowingly or intentionally" distributed drugs "outside the course of professional practice."[7] The physician must specifically intend to divert drugs into illicit channels. See, *Moore*, 423 U.S. at 141, 143 (a physician commits criminal drug distribution when he ceases to act as a physician and acts instead as a drug "pusher"); *Gonzales v. Oregon*, 126 S.Ct. at 923 (the crime under the CSA is "illicit drug dealing and trafficking as conventionally understood") (emphasis added).

B. The Government's interpretation of the regulation criminalizes malpractice

In contrast to the three statutory elements discussed above, the Government frames its prosecutions as a question of whether the physician had a legitimate medical purpose for issuing the prescription and equates that regulatory language with the civil standard of care.

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[7] In *Arthur Andersen LLP v. United States*, this Court explained:

> "We have recognized with regard to similar statutory language that the *mens rea* at least applies to the acts that immediately follow, if not to other elements down the statutory chain." 544 U.S. at 705.

The Court stressed the importance of "limiting criminality * * * to reach only those with the level of 'culpability * * * we usually require in order to impose criminal liability.'" *Id.* at 706, quoting *Aguilar*, 515 U.S. at 602. Thus, because all physicians authorized to prescribe controlled substances do so knowingly or intentionally, the *mens rea* applies to whether the physician intended to distribute the drugs outside the course of professional practice.

The Government has steadfastly maintained, when responding to the district court's *sua sponte* objections (see footnote 1, *supra*) and when defending the convictions on appeal (see Appellee's Brief 46, 51-54), that the convictions were based on a finding that Dr. Rottschaefer lacked a legitimate medical purpose in issuing his prescriptions.

Under that theory, the Government elicited lengthy testimony from DEA agent Colosimo and from its expert, Dr. Clough, that Dr. Rottschaefer did not adhere to generally accepted medical practices (the civil standard of care) with the five patients at issue, such as evidence that Dr. Rottschaefer did not refer the patients to specialists or did not order particular tests. Dr. Clough testified that Dr. Rottschaefer did not have a "legitimate medical purpose" for the prescriptions at issue based on his failure to adhere to the civil standard of care.[8] In essence, the Government argued that the evidence of Dr. Rottschaefer's deficient treatment proved a lack of a "legitimate medical purpose," rendering the prescriptions unlawful. To put a fine point on it, the Government equated a deviation from the civil "standard of care"–that is, failure to follow generally accepted medical standards–with criminal activity.

A similar Government interpretation was at issue

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[8]Dr. Clough was neither a fact witness nor an independent medical examiner--he saw nothing and he examined no one. Instead, Dr. Clough was an expert on the standard of care. He offered his medical credentials, reviewed only the four corners of selected patient charts and, based upon his chart review, concluded that Dr. Rottschaefer deviated from the standard of care and thus the prescriptions were issued without a "legitimate medical purpose." Thus, the Government's expert equated a deviation from the civil standard of care with a lack of a "legitimate medical purpose," a regulatory standard which the Government in turn equates, in this case and others across the country, with the criminal standard "outside the course of professional practice."

in *Gonzales v. Oregon*. There, the Attorney General issued an Interpretive Rule declaring that physician-assisted suicide as permitted by Oregon's Death With Dignity Act had no "legitimate medical purpose," and thus a prescription issued under the Act "violates the [CSA]." *Gonzales*, 126 S.Ct. at 913-14.

This Court rejected the Government's argument. The Court began by noting that the "legitimate medical purpose" regulation, promulgated by the Attorney General, merely "paraphrase[d] the statutory language" of the CSA without incorporating any special expertise or experience that the Government may have had. *Id.* at 915-16. Consequently, the regulation did not affect the interpretation of the statute: "Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute." *Id.* at 916.

The Court held that the regulation did not give the Attorney General the authority to issue an interpretation that criminalized physician-assisted suicide as permitted under Oregon law. *Id.* at 918, 922. The Court stated that the Attorney General claimed "extraordinary" authority in arguing that the regulation gave him the power "to criminalize even the actions of registered physicians, whenever they engage in conduct he deems illegitimate." *Id.* at 918.

The Court further concluded that the Attorney General's interpretation was not correct, because it overstepped the boundaries of the CSA:

> "The statute and our case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood. Beyond this, however, the statute manifests no intent to regulate the practice of medicine generally." *Id.* at 923.

In Dr. Rottschaefer's case, the Government again interprets the statute (21 U.S.C. §841) to criminalize the actions of registered physicians who engage in conduct the Government deems illegitimate, this time by criminalizing a deviation from the civil standard of care, without an affirmative finding of drug dealing. The question is one of statutory construction: Does the Government's interpretation run counter to Congress' intent? The answer is yes.

C. Application of the Government's interpretation in criminal cases results in convictions for conduct that Congress did not criminalize

The somewhat vague phrase "outside the course of professional practice" has been given a narrow interpretation by this Court. In *United States v. Moore*, the Court observed that Congress' intent in enacting the CSA was to create a closed system of medical drug distribution. A physician must be registered with the DEA to obtain authorization to distribute controlled substances. A physician who is not registered is not authorized to distribute controlled substances and therefore violates the CSA by doing so.

A registered physician is authorized to distribute controlled substances "in the course of professional practice." 21 U.S.C. §802(21). That is, a physician's registration "authorizes transactions within 'the legitimate distribution chain' and makes all others illegal." *Moore,* 423 U.S. at 141 (citation omitted). A physician may prescribe drugs "only to act 'as a physician.'" *Id.* A physician who acts as a "'pusher'--not as a physician," violates the CSA. *Id.* at 143.

Thus, "in the course of professional practice" simply means when the physician is acting as a physician; *i.e.*, when the prescriptions are issued in medical channels. When a prescription is issued in a non-medical channel--*e.g.*, sold, or traded for goods or services--criminal liability follows.

Conversely, the Government's interpretation of "without a legitimate medical purpose" is not so narrowly defined. In recent years, the Government has seized on the notion of "legitimacy" to argue for criminal convictions based on medical practices that do not conform to generally accepted medical standards (*i.e.*, the "standard of care" applicable in civil actions) as established by the Government's standard of care witness. The problem, however, is that a medical practice can deviate from generally accepted practices and still be the practice of medicine. It can be malpractice, and still be the practice of medicine. It can be negligent, or even grossly negligent, and still be the practice of medicine.

To be a drug crime, and to support a criminal drug conviction, the issuance of the prescription must not be the practice of medicine; it must occur outside of medical channels. The defendant must abandon his role as a physician to act outside "the course of professional practice." The Government's interpretation, however, does not require the jury to find that much to convict. Although the Government ostensibly brought a sex-for-drugs criminal prosecution against Dr. Rottschaefer, the Government in fact prosecuted a malpractice-type theory of criminal liability.

By lowering the bar for conviction, the Government's interpretation captures conduct that Congress did not criminalize. Rather than having to prove that the physician "ceased to act as a physician," (*Moore*), the Government may win a conviction under its interpretation of the regulatory language by proving that the physician did not follow "generally accepted" medical guidelines. That wider net captures at least four groups of physicians who are not, in fact, dealing drugs: those who practice alternatives, those who are on the cutting edge, those who are negligent (and thus in violation of the civil standard of care--generally defined as adherence to a locality's accepted medical practices--and liable for malpractice, but not dealing drugs), and even those who are not negligent but are in violation of the Government's definition of the standard of care, which at times is stated

more harshly than the standard of care under civil law.

This is not a localized problem. Examples abound.[9] In *United States v. Alerre*, 430 F.3d 681 (CA4 2005), *cert. denied*, 126 S.Ct. 1925 (2006), a South Carolina case, the Government defined a "legitimate medical purpose" as "medical necessity" or conformity to "proper procedures." The Government's expert witness testified that when he said the prescriptions lacked a "legitimate medical purpose," he meant that the issuing physician "failed to adhere to generally accepted medical standards." *Id.* at 686.

In *United States v. Williams*, 445 F.3d 1302 (CA11 2006), a Florida case, the Government's expert witness defined "not the legitimate practice of medicine" by reference to the "fail[ure] to meet usual standards of care." *Id.* at 1305. In rejecting Dr. Williams's challenges on appeal, the Eleventh Circuit interpreted *United States v. Moore* as approving an instruction that the criminal law requires physicians to prescribe "in accordance with a standard of medical practice generally recognized and accepted in the United States." *Id.* at 1309.

In *United States v. McIver*, Fourth Circuit Case No. 05-4884 (oral argument pending), another South Carolina case, the Government argued for conviction (and obtained jury instructions) based on deviations from "the norms of professional practice."

In *United States v. Feingold*, __ F.3d __ (CA9 2006) (Ninth Circuit Case No. 05-10037) (discussed *infra*), an Arizona case, the Government explicitly argued that this Court in *Moore* did not "determine that the phrase 'outside the course of professional practice,' for purposes of a conviction under the CSA, specifically means 'for intentional diversion to illegitimate channels.'" *United States v. Feingold*, Appellee's Brief 24. Rather, the Government argued, the statute "imports considerations

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[9]In each of the four cases discussed below to illustrate the problem, Dr. Rottschaefer's counsel of record consulted or served as appellate counsel for the physicians.

of medical legitimacy and accepted medical standards," rendering the physician subject to a "legitimate medical purpose" requirement to avoid criminal liability. *Id.* at 25, quoting *United States v. Boettjer*, 569 F.2d 1078, 1081 (CA9 1978).[10]

The similarity in these misdirected prosecutions may be traced to a single Government source document. In October 2002, the Department of Justice (DOJ) published on its website a Quick Reference Card intended to "serve as a basic guide to prosecuting prescription drug diversion cases." Quick Reference Card, App 50-51, Pet. App. 23a. (Dr. Rottschaefer was indicted eight months after its publication, on June 2, 2003.) The Quick Reference Card cites 21 C.F.R. §1306.04 for the legitimate medical purpose regulation, then provides:

> "Any individual practitioner who issues or fills a prescription knowing that the prescription was not issued for a legitimate medical purpose in the usual course of professional treatment (or for legitimate and authorized research), shall be subject to penalties provided for violations of the controlled substances law." Pet. App. 26a.

Having thus defined the crime to include a "legitimate medical purpose" element, the Quick Reference Card further defines that element as follows:

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[10]A fifth example is the recently-tried state case of *Pennsylvania v. Heberle*. In discussing the verdict of not guilty with the media, Senior Deputy State Attorney General Doug Wright described the difficulty of proving his case as follows: "You are dealing with a standard-of-care argument. You have conflicting testimony from experts. It is difficult to discern what is the appropriate standard of care." Lisa Thompson, *Doctor Gains Acquittal*, Erie Times-News (May 23, 2006) (accessed at www.goerie.com on May 30, 2006) (emphasis added).

> "**What is a legitimate medical purpose?** A physician is acting with a legitimate medical purpose when he or she prescribes medical treatments that are in **strict compliance with well-established and generally accepted medical guidelines, and administers medical treatments that appropriately and correctly address and relieve the present medical condition.**" Pet. App. 26a-27a (bold print in original).[11]

By this logic, the Government interprets 21 U.S.C. §841(a) to criminalize any deviation from "strict compliance with well-established and generally accepted medical guidelines." Note that this definition requires not only compliance with the civil standard of care, but *strict* compliance, to avoid criminal liability, and further requires the physician to *achieve* the desired result (to "correctly * * * relieve the present medical condition"). Tellingly, this harsh rephrasing of the civil standard of care establishes a standard that would not even prove civil malpractice. A physician need only show compliance, not strict compliance, with generally accepted medical guidelines to avoid malpractice liability, and need not achieve perfection on each treatment attempt. In Pennsylvania, where Dr. Rottschaefer practiced medicine, the standard of care requires only that a physician not make an "unwarranted departure from generally accepted standards of medical practice resulting in injury to a patient[.]" *Toogood v. Owen J. Rogal, D.D.S., P.C.*, 573 Pa. 245, 254-55 (2003).

As these examples illustrate, the Government's interpretation of "legitimate medical purpose" does not have the same meaning as "outside the course of professional practice." By framing its prosecutions

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[11]The Quick Reference Card has been removed from DOJ's website.

around its interpretation of the regulatory phrase "legitimate medical purpose," the Government seeks, and obtains, convictions based on alleged violations of the civil standard of care, and relieves itself of the burden of proving drug dealing. The Government's interpretation is invalid. "[W]hen Congress wants to regulate medical practice in the given scheme, it does so by explicit language in the statute." *Gonzales*, 126 S.Ct. at 924. The Government's interpretation, which permits conviction based on evidence of substandard medical practices as proof of illegitimacy, must fail.

D. The Third Circuit's decision in this case is in conflict with the Ninth Circuit's decision in a similar physician prosecution

Dr. Rottschaefer contended that the prosecution and defense commingled the civil standard of care and the criminal conviction standard so extensively that the civil standard of care became the conviction standard. Dr. Rottschaefer argued that the Government accomplished that through interpreting a "legitimate medical purpose" to mean the civil standard of care. Appellant's Brief 35 (discussing and providing citations to the record of the repeated instances in which the Government's expert Dr. Clough defined "legitimate medical purpose" by reference to the standard of care).

Dr. Rottschaefer challenged that trial strategy on appeal, as prosecutorial misconduct and as ineffective assistance of defense counsel. In rejecting that challenge, the Third Circuit addressed only the regulatory language, and ignored the Government's interpretation of that language and its application at trial. The Third Circuit quoted the relevant statute, 21 U.S.C. §841(a), and the "legitimate medical purpose" regulation, 21 C.F.R. §1306.04, to conclude that "the regulations clearly state that prescribing drugs for other than a 'legitimate medical purpose' is a basis for criminal liability under the CSA." Pet. App. 4a.

The Third Circuit summarized Dr. Rottschaefer's

argument as follows:

> "Rottschaefer's prosecutorial misconduct and ineffective assistance of counsel claims are based on his theory that he was improperly tried and convicted under a medical malpractice or negligence standard, rather than the higher standard of proof required for criminal convictions.[1] He argues that the 'no legitimate medical reason' standard used by the prosecution throughout the trial, without defense objection, equates to a civil, rather than a criminal, standard of liability.
>
> "This argument finds no support in the law." Pet. App. 3a-4a (footnote omitted).

The Ninth Circuit, however, recently responded differently to similar arguments in *United States v. Feingold*, __ F.3d __ (CA9 2006). There, the defendant argued that the jury instructions commingled the civil standard of care and the criminal conviction standard: "Dr. Feingold argues that, by using the professional 'standard of care' as a benchmark in the jury instructions, the district court allowed the jury to convict simply upon finding that he had been a negligent doctor." *Id.* at ___ (slip op., at 8031).

The Ninth Circuit phrased the "difficult and important" question presented as: "[W]hether a practitioner's conviction under 21 U.S.C. §841(a) is valid if it rests only on a finding of intentional malpractice." *Id.* at ___ (slip op., at 8032). The Ninth Circuit answered no.

The Ninth Circuit recognized that its case law required a careful examination of how the civil standard of care was used in a criminal prosecution. Evidence regarding the civil standard of care may be relevant and admissible so that the jury may compare the defendant's conduct to the applicable standard of care, but a district

court "impermissibly lower[s] the standard for criminal liability by instructing the jury to determine whether a practitioner-defendant has complied, or attempted to comply, with the standard of care." *Id.* at ___ (slip op., at 8033).

Under that rationale, the Ninth Circuit would have rejected the idea that the Government, which used its expert witness to equate the civil standard of care with a lack of "legitimate medical purpose," did not err in applying that standard simply because it was couched in a phrase that has been accepted in other applications.

E. The error is not likely to be corrected by the circuit courts

The circuit courts of appeals are not likely to correct the error in allowing application of the Government's interpretation, because, as the Third Circuit reasoned in this case (see, Pet. App. 4a-6a), acceptance of convictions based on "legitimate medical purpose" is entrenched in circuit court case law.

The Second, Fourth, Fifth, Sixth, Eight, Tenth, and Eleventh Circuits all have accepted reliance on the "legitimate medical purpose" language in drug prosecutions of physicians. *See, e.g., United States v. Nelson*, 383 F.3d 1227, 1231-32 (CA10 2004) ("A practitioner has unlawfully distributed a controlled substance if she prescribes the substance either outside the usual course of medical practice or without a legitimate medical purpose"; citing *Moore* and 21 C.F.R. §1306.04, "the governing regulation"); *United States v. Pedrick*, 181 F.3d 1264, 1268 n 8 (CA11 1999) ("it is illegal for a practitioner * * * to issue a prescription for a controlled substance without a legitimate medical purpose and outside the usual course of his professional practice"); *United States v. Ekinci*, 101 F.3d 838 (CA2 1996) (characterizing the crime under 21 U.S.C. §841(a) as distributing controlled substances "without a legitimate medical purpose" and upholding conviction based on indictment and jury instructions phrased in

those terms); *United States v. Daniel*, 3 F.3d 775, 778 (CA4 1993) ("The indictment's allegations that the attempted distributions or dispensations were 'not ... for a legitimate medical purpose' satisfy" the third element of the crime); *United States v. Norris*, 780 F.2d 1207, 1209 (CA5 1986) (the third element of the crime is distributing "other than for a legitimate medical purpose and in the usual course of his professional practice"; that element derives from 21 C.F.R. §1306.04); *United States v. Kirk*, 584 F.2d 773, 784 (CA6 1978), *cert. denied*, 439 U.S. 1048 (stating: "It has been held that there is no difference in the meanings of the statutory phrase, 'In the usual course of professional practice' and the regulations' phrase, 'legitimate medical purpose,'" citing *United States v. Plesons*, 560 F.2d 890, 897 (CA8 1977), *cert. denied*, 434 U.S. 966, and *United States v. Rosenberg*, 515 F.2d 190, 197 (CA9 1975), *cert. denied*, 423 U.S. 1031; and subsequently quoting 21 U.S.C. §841(a)(1) and 21 C.F.R. §1306.04(a) in support).

The Third Circuit relied on this body of case law to find no error in the Government's use of the regulatory language in this case, notwithstanding the manner in which the Government interpreted and applied the regulatory language in this prosecution. Pet. App. 4a-6a.

The circuit courts are not likely to correct the erroneous Government interpretation in light of the precedents that rely on the "legitimate medical purpose" language in their own case law. This issue requires review and correction from this Court.

F. Summary

In short, the Government interpreted the regulation to establish a new definition of the crime of unlawful drug distribution. That it could not do. *Gonzales*, 126 S.Ct. at 918. Under the Government's interpretation, the Government does not need to prove that the physician ceased to act as a physician; the Government only needs to prove that the physician's practices fell below the mean.

Physicians throughout the country have been similarly tried under the erroneous Government interpretation. The error is entrenched.

Because Dr. Rottschaefer and other physicians face prosecutions and criminal drug distribution convictions that may rest on substandard medical practices rather than drug dealing, review is warranted. This case presents the Court with an opportunity to announce that a criminal conviction cannot be had based on substandard medical practices claimed to violate the regulation and thus the CSA.

II. Has the "interest of justice" standard of Federal Rule of Criminal Procedure Rule 33 been circumvented by the judicially-created factors test?

The second issue in this case presents an important question about the administration of the law and the integrity of a criminal trial in the federal system.

Just before Dr. Rottschaefer's trial began, Jennifer Riggle ended her relationship with her incarcerated boyfriend, Barron Shelton. Upon Shelton's release from prison several months later, Shelton delivered to Dr. Rottschaefer's attorneys 72 letters (consisting of 529 pages) hand-written by Riggle to Shelton. Those letters, written in the months of investigation, grand jury, and trial preparation in Dr. Rottschaefer's prosecution, detail Riggle's plan to fabricate allegations that she exchanged sexual favors for prescriptions with Dr. Rottschaefer, the deal for a shorter sentence that she made for that testimony, her perjury to the grand jury, her plan to commit perjury at the trial, and her anxiety over committing perjury and fear that her "secret" would be discovered. See, Pet. App. 36a-87a (excerpts of letters). For example, Riggle wrote:

> "Listen I have a question about my case. I think they want to subpeaned [sic] me to a grand jury about the doctor I was seeing.

> They're saying he was bribing patients with sex for pills, but it never happened to me. DEA said they will cut my time for a good testimony. I don't want to be a snitch but what should I do?" Pet. App. 44a (emphasis added).

Riggle did, in fact, perjure herself at Dr. Rottschaefer's trial by testifying to the fabricated allegations that Dr. Rottschaefer gave her prescriptions in exchange for sexual favors.

Upon receiving those letters, Dr. Rottschaefer's attorneys moved for a new trial. Without awaiting responsive pleadings or holding a hearing, the district court ruled that the letters were "merely cumulative and impeaching" and did not warrant a new trial.

Dr. Rottschaefer challenged that ruling on appeal, arguing for a new trial based on Federal Rule of Criminal Procedure 33's "interest of justice" standard, the Third Circuit's five factor test for granting a new trial,[12] and the appellate courts' supervisory authority. Appellant's Supplemental Brief at 10-43. The Third Circuit ruled that the newly discovered evidence of Riggle's perjury was merely cumulative and impeaching and thus did not pass the factors test and did not require a new trial. The Third Circuit also declined to exercise its supervisory powers to order a new trial.

The Third Circuit's strict application of the judicially-created factors test has subverted the intent of Rule 33. Under the Rule, a new trial should be granted when the interest of justice so requires. The Third Circuit's formulaic application of the factors test failed to

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[12]Those factors are: the evidence must in fact be newly discovered, the movant must have acted diligently, the evidence relied upon must not be merely cumulative or impeaching, the evidence must be material to the issues, and the evidence must be of such nature that it would probably produce an acquittal. *United States v. Iannelli*, 528 F.2d 1290, 1292 (CA3 1976).

consider the interest of justice, and in so doing failed to serve the interest of justice.

The Seventh Circuit recognized the problem with a mechanical application of the factors test in *United States v. Taglia*, 922 F.2d 413 (CA7 1991). As the court described, the "judicial language" that "newly discovered evidence that is merely impeaching is not a permissible ground for a new trial" appears in "countless cases," but "illustrates the tendency to overgeneralize." *Id.* at 415. The court cautioned against taking the overgeneralized language "at face value," for: "Nothing in the text or history of Rule 33, or of the cognate civil rule (Rule 60(b)), supports a categorical distinction between types of evidence; and we cannot see the sense of such a distinction." *Id.* Where the interest of justice requires a new trial, one should be granted. *Id.* That is the only requirement of Rule 33.

> "It is easy to confuse a practice with a rule. The practice has been to deny new trials where the only newly discovered evidence was impeaching. But the practice should not be taken to imply a rule that even if the defendant proves that his conviction almost certainly rests on a lie, the district court is helpless to grant a new trial." *Id.*

Ultimately, however, the court held that *Taglia* was not the "rare case" in which impeaching evidence required a new trial in the interest of justice. *Id.* at 416.

This is the rare case. Rarely will a court be confronted with more forthright, undeniable evidence that a lead witness's trial testimony was perjured than in this case. Riggle's 72 handwritten letters, 22 of which discuss Dr. Rottschaefer's case and her plan to commit perjury, offer a detailed insight into the witness's fabrications and motivation to lie. See, Pet. App. 36a-87a. The revelation that Dr. Rottschaefer did not give Riggle prescriptions in exchange for sexual favors, and, more importantly, of Riggle's planned perjury creates the

compelling case in which the evidence impeaching Riggle requires a new trial in the interest of justice.[13]

Even as evidence rebutting motive, "a jury would have given this evidence great weight." *House v. Bell*, 547 U.S. __, 126 S.Ct. 2064, 2079 (2006). In *House*, the prosecution had argued that a sexual assault was the defendant's motive for murder. When DNA evidence later cleared him of the sexual assault, the Government argued that the evidence was immaterial, because neither sexual contact nor motive were elements of the offense. This Court disagreed that the evidence was immaterial: "When the only direct evidence of sexual assault drops out of the case, so, too, does a central theme in the State's narrative linking House to the crime." *Id.* Here, too, the jury likely gave the perjured testimony great weight, and without it, the central theme of the Government's narrative (that Dr. Rottschaefer distributed prescriptions in order to receive sexual favors) falls away.[14] The

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[13]Dr. Rottschaefer assumes for the purpose of argument that the letters were merely impeaching, as the lower courts held. Even construed as merely impeaching, the letters warrant a new trial in the interest of justice.

Dr. Rottschaefer notes, however, that he continues to believe that the letters are exculpatory, as he argued below. Under the correct legal standard, by which the crime requires proof that the physician ceased to act as a physician and acted as a conventional drug dealer, the allegations of a sex-for-drug exchange presented powerful evidence, and the newly-discovered letters refuting those allegations are exculpatory.

[14]Moreover, as this Court recognized in *House*:

> "Law and society, as they ought to do, demand accountability when a sexual offense has been committed, so not only did this evidence link House to the crime; it likely was a

discovery that Riggle's allegations were perjured requires a new trial.

By applying its factors test as a substitute for, but ultimately without regard to, the interest of justice test of Rule 33, the Third Circuit abrogated the purpose of the Rule. The interest of justice is not served by protecting a verdict rendered upon substantial perjured testimony. The interest of justice demands a new trial. That is all Rule 33 requires.

This Court should allow review to remind the circuit courts that judicially-created tests must always be applied to serve the statutes, rules, or regulations from which they derive; they should not move the court away from the language it is intended to serve. This case provides an appropriate vehicle for that reminder, for the stark evidence of perjury at the heart of this case requires a new trial in the interest of justice.

CONCLUSION

Dr. Rottschaefer respectfully urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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July 2006

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factor in persuading the jury not to let him go free." *Id.*

Similar considerations apply in this case, where the Government's theory was that Dr. Rottschaefer manipulated and exploited his patients for sexual gratification.

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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 04-4015 and 05-1229

UNITED STATES OF AMERICA,

v.

BERNARD ROTTSCHAEFER,
Appellant

Appeals from the United States District Court
for the District of Western District of Pennsylvania
(D.C. Criminal 03-cr-00162)
District Judge.: Honorable Gary L. Lancaster

Argued March 3, 2006

Before: RENDELL, BECKER and GREENBERG,
Circuit Judges.

(Filed: April 27, 2006)

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OPINION OF THE COURT

RENDELL, *Circuit Judge*.

Bernard Rottschaefer, M.D. challenges his convictions and sentence on 153 counts of a 208-count indictment charging unlawful distribution of controlled

substances, in violation of 21 U.S.C. § 841(a)(1). At trial, five of Rottschaefer's patients testified that he fed their drug addictions by prescribing them Xanax, Oxycontin, and other addictive painkillers; four of them testified that they performed sexual favors in exchange for the prescriptions. Rottschaefer seeks a new trial based on alleged prosecutorial misconduct, ineffective assistance of counsel and evidence that a government witness perjured herself at trial. We conclude that these claims lack merit and will affirm Rottschaefer's convictions. We will vacate his sentence and remand for resentencing in accordance with *United States v. Booker*, 543 U.S. 220 (2005).

I.

Rottschaefer's prosecutorial misconduct and ineffective assistance claims are based on his theory that he was improperly tried and convicted under a medical malpractice or negligence standard, rather than the higher standard of proof required for criminal convictions.[1] He argues that the "no legitimate medical reason" standard used by the prosecution throughout the

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[1]We note that these claims provide rather awkward vehicles for Rottschaefer's substantive arguments. Rottschaefer's real contentions are that the law was somehow confused in the District Court and that the evidence presented was insufficient to support a conviction under the statute. Rather than challenging the jury instructions or the sufficiency of the evidence directly, however, he chose to proceed on prosecutorial misconduct and ineffective assistance grounds.

trial, without defense objection, equates to a civil, rather than a criminal, standard of liability.

This argument finds no support in the law. The Controlled Substances Act ("CSA"), under which Rottschaefer was convicted, provides: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally–(1) to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). Physicians are exempt from this provision to the extent that they act lawfully, *see United States v. Moore*, 423 U.S. 122, 131 (1975), but they are subject to criminal liability when their drug prescribing and dispensing activities fall "outside the usual course of professional practice," *id.* at 124. The CSA's implementing regulations provide that, to be effective, a prescription "must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice," and that a person who knowingly issues an ineffective prescription "shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances." 21 C.F.R. § 1306.04(a). Thus, the regulations clearly state that prescribing drugs for other than a "legitimate medical purpose" is a basis for criminal liability under the CSA.

Moreover, courts of appeals frequently use the "no legitimate medical purpose" standard to define physician liability under § 841(a)(1). For example, the Fifth Circuit Court of Appeals stated the elements of the offense as follows:

> To convict Dr. Norris of violating 21 U.S.C. § 841(a)(1), the government was required to prove "(1) that he distributed or dispensed a controlled substance, (2) that he acted knowingly and intentionally, and (3) that he did so other than for a legitimate medical purpose and in the usual course of his professional practice."

United States v. Norris, 780 F.2d 1207, 1209 (5th Cir. 1986) (quoting *United States v. Rosen*, 582 F.2d 1032, 1033 (5th Cir. 1978)). The Court explained that, "[a]lthough the third element is not expressly required by § 841," it derives from the language in the "pertinent regulations" quoted above. *Id.* (quoting 21 C.F.R. § 1306.04(a)). Other courts adopt the same approach. *See, e.g., United States v. Nelson*, 383 F.3d 1227, 1231-32 (10th Cir. 2004) ("A practitioner has unlawfully distributed a controlled substance if she prescribes the substance either outside the usual course of medical practice or without a legitimate medical purpose."); *United States v. Voorhies*, 663 F.2d 30, 33 (6th Cir. 1981) (rejecting defendant's challenge to jury instruction based on 21 C.F.R. § 1306.04 and incorporating "other than a legitimate medical purpose" standard).

Finally, "there is considerable room to doubt whether" the distinction between the "no legitimate medical reason" and the "outside the usual course of professional practice" standards "is of any importance." *Nelson*, 383 F.3d at 1231. Several courts have held that "there is no difference in the meanings of the statutory phrase, '[i]n the course of professional practice' and the

regulations' phrase, 'legitimate medical purpose,'" *United States v. Kirk*, 584 F.2d 773, 784 (6th Cir. 1978) (citing cases); the Fourth Circuit Court of Appeals goes even farther, holding that the "without a medical purpose" standard that Rottschaefer challenges is "*more* strict than [the "outside the usual course of professional practice" standard] required by *Moore*." *United States v. Cuong*, 18 F.3d 1132, 1138 (4th Cir. 1994) (emphasis added). As the *Nelson* court observed:

> It is difficult to imagine circumstances in which a practitioner could have prescribed controlled substances within the usual course of medical practice but without a legitimate medical purpose. Similarly, it is difficult to imagine circumstances in which a practitioner could have prescribed controlled substances with a legitimate medical purpose and yet be outside the usual course of medical practice.

383 F.3d at 1231.

Thus, the prosecution acted well within the law when it defined Rottschaefer's crimes in terms of prescribing narcotics for "no legitimate medical reason." Rottschaefer has not explained to our satisfaction how an improper standard was applied in his trial at all, much less how the application of that standard amounted to prosecutorial misconduct or ineffective assistance of counsel. We will not reverse his convictions on these grounds.

II.

Rottschaefer also appeals the District Court's denial of his motion for a new trial under Fed. R. Crim. P. 33. Rottschaefer moved for a new trial based on evidence, discovered after trial, that one of his former patients perjured herself at his trial. The patient, Jennifer Riggle, had testified at trial that she traded sex with Rottschaefer for various prescriptions. After trial, Rottschaefer's attorney discovered 529 pages of handwritten correspondence between Riggle and her then-boyfriend in which Riggle denied having sex with Rottschaefer and explained that she had agreed to lie in order to receive a more favorable sentence on drug charges pending against her in state court. In the letters, Riggle describes conversations in which DEA agents suggested that she would be rewarded for "good" testimony[2] and explains her decision to go along with their suggestions.[3]

The District Court denied Rottschaefer's motion. Although he found "no reason to doubt [the letters'] authenticity," the District Court Judge concluded that the

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[2]"They're saying he was bribing patients with sex for pills, but it never happened to me. DEA said they will cut my time for good testimony. I don't want to be a snitch but what should I do? Everyone else is testifying against him."

[3]"I had just prayed & asked God to give me the confidence to be able to lie about the Dr. just this once. I am not a good liar & I'm scared. The only reason I'm doing it is cause he's pretty much already had & he doesn't deserve to be practicing. He has ruined many lives & some people even O.D.'d on the Oxy's."

letters did not justify a new trial because they did no more than provide impeachment material to the defense and were cumulative of other evidence adduced at trial. Because they were not made under oath, Riggle's statements in the letters would have been admissible only for impeachment purposes; the evidence was cumulative because one of Rottschaefer's witnesses had testified at trial that Riggle had told her that she had lied about committing sex acts with Rottschaefer to receive a deal from the DEA.

"Rule 33 motions for a new trial are directed to the district court's discretion, and our function on appeal is to decide whether the trial judge abused that discretion or failed to exercise it." *United States v. Iannelli*, 528 F.2d 1290, 1292 (3d Cir. 1976). Although we find the District Court's analysis somewhat perfunctory, we are not convinced that it abused or failed to exercise its discretion in denying Rottschaefer's motion.

A district court may only grant a new trial on the basis of newly discovered evidence where five requirements are met:

- the evidence was, in fact, newly discovered, *i.e.*, discovered since trial;
- facts are alleged from which the court can infer diligence on the part of the movant;
- the new evidence is not "merely cumulative or impeaching";
- the evidence is material to the issues involved; and
- the evidence is such, and of such nature, that on a new trial it would probably produce an acquittal.

United States v. Saada, 212 F.3d 210, 216 (3d Cir. 2000). The defendant bears a "'heavy burden' in meeting these requirements." *Id.* (quoting *United States v. Ashfield*, 735 F.2d 101, 112 (3d Cir. 1984)).

As an initial matter, we agree with the District Court's assessments of the letters as "cumulative" and "impeaching." But we must consider several arguments that the Court declined to address as to why the letters are not "*merely* cumulative or impeaching." First, Rottschaefer argues that the letters are "exculpatory." *Cf. Saada*, 212 F.3d at 216 (implying that evidence that is "exculpatory" is not "only impeaching"). This contention lacks merit. While the letters unquestionably undermine Riggle's testimony that she traded sexual favors for prescriptions, they do not exculpate Rottschaefer from the underlying offense. The crime for which Rottschaefer was convicted was not, as he claims, trading drugs for sex. Rather, he was convicted of unlawfully distributing controlled substances outside the course of professional practice. If anything, Riggle's letters *reinforce* other evidence that Rottschaefer's prescription practices fell outside of the bounds of ordinary professional practice.[4]

Rottschaefer also argues that the evidence of Riggle's perjury raises doubts about the testimony of three other government witnesses. Evidence introduced

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[4]For example, Riggle's letters state: "[Rottschaefer] has ruined many lives & some people even O.D.'d on the Oxy's," and "See, the doctor is still in the wrong for not wanting to see Xrays of my back before prescribing those pills. All he did was have me bend over to feel my spine & just by that he decided I was in a lot of pain."

at trial established that the four women who testified that they exchanged sex for drugs with Rottschaefer, including Jennifer Riggle, knew each other and worked together to procure Oxycontin from Rottschaefer to abuse and sell. Rottschaefer also claims that each of the four women initially denied having sexual contact with Rottschaefer. He argues that evidence of Riggle's perjury would have raised an inference that the other witnesses were also lying.

This argument fails because the record already contained evidence of Riggle's perjury from which Rottschaefer could have argued that the testimony of the other witnesses was tainted. As the District Court pointed out, Deborah Peterson, who had been incarcerated at Westmoreland County Prison with Riggle, testified at trial that Riggle had confided in Peterson about lying in Rottschaefer's case. Specifically, Peterson said, "what [Riggle] ended up telling me was that she flat outright lied about having committed some sexual act with Dr. Rottschaefer to receive a reduced sentence or possibly no penalty at all." When defense counsel questioned Peterson further about Riggle's motives for lying, Peterson responded:

> [T]o state like pretty much in exact terms the reason and how she came about doing it was as she was being questioned by the federal agents, I guess, in prison, insinuated that–about some kind of sexual acts could this have possibly occurred, and she took it as an opportunity–she seen it as an opportunity, and that's exactly how she

> stated it to me, to help herself if she would go along with that.

Peterson's testimony calls the other witnesses' testimony into question in precisely the same manner as Riggle's letters. Of course, evidence of Riggle's perjury in the form of Riggle's own letters might have been more compelling than Peterson's testimony. But it would not have added any new facts to the jury's calculus, and is therefore "merely cumulative."

Furthermore, although the District Court did not discuss this point, we note that the evidence proffered by Rottschaefer after trial would not "probably produce an acquittal." *Saada*, 212 F.3d at 216. As discussed above, sexual contact with patients was not an element of the convicted offense. A review of the verdict demonstrates that the jury understood this point–it acquitted Rottschaefer of several counts despite testimony of sexual favors, and convicted him of others with respect to which there was no evidence of sexual contact.[5] On this record,

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[5]Rottschaefer's trial counsel acknowledged this point at Rottschaefer's sentencing hearing, when he said:

> If you look at that verdict, they acquitted him, I believe, of 53 counts involving the same five women who testified for the government because of various reasons that the Court is aware of. The jury apparently to reach that kind of verdict, if you analyze that verdict in any way at all, wasn't based on sex for drugs. It was based on the testimony of a supposedly expert witness for the government who went through all these multitude of charts and went

we cannot conclude that further evidence that Riggle did not engage in sexual activity with Rottschaefer would have affected the jury's verdict.

Moreover, the record contains sufficient evidence, independent of Riggle's testimony, to uphold Rottschaefer's convictions. The government's expert, Dr. Douglas Clough, testified that there was no evidence in Riggle's medical records of pain that would justify prescribing OxyContin or other addictive narcotics. He also noted that Rottschaefer never ordered or performed diagnostic tests regarding the back problem for which he prescribed the drugs. Finally, Dr. Clough opined that there was "no legitimate reason to keep prescribing the chronic long-acting potentially addicting narcotic . . . without an attempt . . . to evaluate and treat the back pain without using some therapeutic modality other than the chronic long-acting narcotic." This testimony, particularly in conjunction with the evidence that Rottschaefer had issued prescriptions to other women for apparently illicit purposes, amply supports the jury's guilty verdicts on the charges that Rottschaefer prescribed narcotics to Jennifer Riggle outside the usual course of professional practice.

Thus, although we acknowledge that the District Court could have engaged in a more thorough analysis of Rottschaefer's claims, we cannot conclude that it abused its discretion in denying his Rule 33 motion for a new trial. We also decline Rottschaefer's invitation to exercise our "supervisory powers," pursuant to *Mesarosh v. United*

> into expressing his opinion as to what was required in order to issue a prescription . . . .

States, 352 U.S. 1 (1956), to grant him a new trial. We do not think that the situation before us is comparable to *Mesarosh*. We will accordingly affirm the District Court's decision and Rottschaefer's convictions.

III.

Rottschaefer was sentenced to 78 months in prison on September 24, 2004, under the mandatory Guidelines regime, based on drug amounts found by the District Court. He argues that his sentence violated *United States v. Apprendi*, 530 U.S. 466 (2000), and *United States v. Booker*, 543 U.S. 220 (2005). Having determined that *Booker* issues are best resolved by the District Court in the first instance, we will vacate his sentence and remand for resentencing in accordance with that opinion. *See United States v. Davis*, 407 F.3d 162, 165 (3d Cir. 2005) (en banc).

IV.

For the foregoing reasons, we will affirm Rottschaefer's convictions. We will vacate his sentence and remand for resentencing under *Booker*.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 04-4015 and 05-1229

UNITED STATES OF AMERICA

v.

BERNARD ROTTSCHAEFER,
Appellant

Appeals from the United States District Court
for the Western District of Pennsylvania
(D.C. Criminal No. 03-cr-00162)
District Judge: Honorable Gary L. Lancaster

Argued March 3, 2006

Before: RENDELL, BECKER and GREENBERG,
Circuit Judges.

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and were argued on March 3,2006. On consideration whereof, it is now here

ORDERED and ADJUDGED that the October 14,2004 judgment of sentence is VACATED and this matter is REMANDED for resentencing. The District Court order entered on January 12, 2005 is hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron, Clerk

Dated: April 27, 2006

APPENDIX C

UNITED STATES CODE

TITLE 21 – FOOD AND DRUGS

§ 802. Definitions

As used in this subchapter:

* * * * *

(21) The term 'practitioner' means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

* * * * *

§ 822. Person required to register

(a) Period of registration

(1) Every person who manufactures or distributes any controlled substances or list I chemical, or who proposes to engage in the manufacture or distribution of any controlled substance or list I chemical, shall obtain

annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him.

(2) Every person who dispenses, or who proposes to dispense, any controlled substance, shall obtain from the Attorney General a registration issued in accordance with the rules and regulations promulgated by him. The Attorney General shall, by regulation, determine the period of such registrations. In no event, however, shall such registrations be issued for less than one year nor for more than three years.

(b) Authorized Activities

Persons registered by the Attorney General under this subchapter to manufacture, distribute, or dispense controlled substances or list I chemicals are authorized to possess, manufacture, distribute, or dispense such substances or chemicals (including any such activity in the conduct of research) to the extent authorized by their registration and in conformity with the other provisions of this subchapter.

(c) Exceptions

The following persons shall not be required to register and may lawfully possess any controlled substance or list I chemical under this subchapter:

(1) An agent or employee of any registered manufacturer, distributor, or dispenser of any controlled

substance or list I chemical if such agent or employee is acting in the usual course of his business or employment.

(2) A common or contract carrier or warehouseman, or an employee thereof, whose possession of the controlled substance or list I chemical is in the usual course of his business or employment.

(3) An ultimate user who possesses such substance for a purpose specified in section 802(25) of this title.

(d) Waiver

The Attorney General may, by regulation, waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety.

(e) Separate registration

A separate registration shall be required at each principal place of business or professional practice where the applicant manufactures, distributes, or dispenses controlled substances or list I chemicals.

(f) Inspection

The Attorney General is authorized to inspect the establishment of a registrant or applicant for registration in accordance with the rules and regulations promulgated by him.

* * * * *

§ 829. Prescriptions

(a) Schedule II substances

Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.], may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary by regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 503(b) of that Act [21 U.S.C.A. § 353(b)]. Prescriptions shall be retained in conformity with the requirements of section 827 of this title. No prescription for a controlled substance in schedule II may be refilled.

(b) Schedule III and IV substances

Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.], may be dispensed without a written or oral prescription in conformity with section 503(b) of that Act [21 U.S.C.A. § 353(b)]. Such prescriptions may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription unless renewed by the practitioner.

(c) Schedule V substances

No controlled substance in schedule V which is a drug may be distributed or dispensed other than for a medical purpose.

(d) Non-prescription drugs with abuse potential

Whenever it appears to the Attorney General that a drug not considered to be a prescription drug under the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.] should be so considered because of its abuse potential, he shall so advise the Secretary and furnish to him all available data relevant thereto.

* * * * *

§ 841. Prohibited Acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally–

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

APPENDIX D

CODE OF FEDERAL REGULATIONS

TITLE 21 – FOOD AND DRUGS

§ 1306.04 Purpose of issue of prescription

(a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person using it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

(b) A prescription may not be issued in order for an individual practitioner to obtain controlled substances for supplying the individual practitioner for the purpose of general dispensing to patients.

(c) A prescription may not be issued for 'detoxification treatment' or 'maintenance treatment,' unless the prescription is for a Schedule III, IV, or V narcotic drug approved by the Food and Drug

Administration specifically for use in maintenance or detoxification treatment and the practitioner is in compliance with requirements in § 1301.28 of this chapter.

APPENDIX E

Prescription Drug Diversion Prosecutions
Quick Reference Card 2002

We intend this card to serve as a basic guide to prosecuting prescription drug diversion cases. Users should check recent cases and, where necessary, consult with their supervisors before making a final decision regarding charging strategies. For space purposes, we left the "U.S." out of all of our citations. If the cite involves a civil case, we noted the same.

Why Drug Diversion Prosecutions - Civil and Criminal?

■ The Controlled Substances Act, 21/801 *et seq.*, states that "except as provided by this subchapter, it shall be unlawful for any person ***knowingly or intentionally . . . to distribute, or dispense a controlled substance.*** 21/841(a)(1). Section 842(c)(1) authorizes civil penalties for a violation of the act. "In order to enable physicians and certain others (e.g., manufacturers, nurses, and pharmacists) lawfully to distribute or dispense drugs within the course of their professional practice, Congress provided that '[persons registered . . . under this subchapter . . . to the extent authorized by their registration and in conformity with the other provisions of this subchapter.'" 21/822(b). "This exemption from the Act granted to medical practitioners engaged in distribution of controlled substances ***is a limited one***

since practitioners possess increased access to controlled substances and therefore greater opportunities for diversion. *ALN Corp.*, 1993 WL 402803, *2 (D. Conn.) (Civil case), quoting *Vamos*, 797 F.2d 1146, 1152-53 (2d Cir. 1986); *see also Moore*, 423 U.S. 122, 135 (1975); Clinical Leasing Service, Inc., 759 F. Supp. 310, 316-17 (E.D. La. 1990) (civil case). ■ Congress provides an exemption to physicians and other medical practitioners who use their ability to issue controlled substances to heal patients, but allows prosecution of those unscrupulous medical professionals who use these privileges to deal and steal. *See Singh*, 54 F.3d 1182, 1188-89 (4th Cir. 1995) ("Congress gave doctors the power to authorize the distribution of dangerous addictive drugs, and with that power, Congress also places upon [the doctor] the responsibility to distribute them wisely within the course of [the doctor's] medical practice").

Relevant Definitions

■ **Practitioner** means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.**21/802(21)**. ■ **Controlled Substance** means a drug or other substance, or immediate precursor, included in Schedule I, II, III, IV, or V of 21/812. **21/802(6)**. ■ **Deliver** means the actual, constructive, or attempted transfer of a controlled

substance or a listed chemical, whether or not there exists an agency relationship.**21/802(8)**. ■ **Dispense** means to deliver a controlled substance to an ultimate user or research subject, by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject. **21/802(10)**. ■ **Distribute** means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical. The term "distributor" means a person who so delivers a controlled substance or a listed chemical.**21/802(11)**. ■ **Ultimate User** means a person who has lawfully obtained, and who possess[es], a controlled substance for his own use or fur the use of a member of his household or for an animal owned by him or by a member of his household.**21/802(27)**. See *Bartee*, 479 F.2d 484 (10th Cir. 1973) (various definitions).

Basic Element of § 841 Offense

■ The basic elements are: (1) the defendant knowingly or intentionally, (2) distributed or dispensed, (3) a controlled substance. The statutory language of 21/841 does not contain any other elements. However, to prove: that the distribution or dispensation via prescription was illegal, the government must show that there was no legitimate medical purpose for the prescription and the same was not issued/filled in the usual course of professional

practice or was beyond the bounds of medical practice. *Singh*.

When is a Prescription for a Controlled Substance Effective?

■ A prescription for a controlled substance is effective if issued **(1) for a legitimate medical purpose (2) by an individual practitioner (3) acting in the usual course of h is professional practice, 21 C.F.R. §1306.04(a).** ■ The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. ***See Milicia*, 769 F. Supp. 877, 878-80 & n.8 (E.D. Pa.1991), citing § 1306.04(a).** ■ Any individual practitioner who issues or fills a prescription knowing that the prescription was not issued for a legitimate medical purpose in the usual course of professional treatment (or for legitimate and authorized research), shall be subject to penalties provided for violations of the controlled substances law. A conviction will be upheld even if the government does not present compelling evidence that the doctor prescribed with malicious motive or the desire to make a profit. *Singh*, at 1188.

What is a Legitimate Medical Purpose?

■ A physician is acting with a legitimate medical purpose when he or she prescribes medical treatments that are in **strict compliance with well-established and**

generally accepted medical guidelines, and administers medical treatments that appropriately and correctly address and relieve the present medical condition. *Tran Trong Coung*, 18 F.3d 1132 (4th Cir. 1994) (reversed and remanded). ■ To decide whether a physician acted without a legitimate medical purpose, you must examine all of the defendant's actions and the circumstances surrounding them. ■ Abbreviated or no medical history or physical examination is probative on the question of whether a legitimate medical purpose exists. *Chin*, 795 F.2d 496, 500 (5th Cir. 1986). ■ Evidence that a doctor tells patients where to get their prescriptions filled, prescribes drugs even after learning of a patient's addiction to them, or asks patients about the amount or type or type of drugs they want, is probative of whether a legitimate medical purpose exists for the dispensed controlled substances. *Singh*, 54 F.3d 1182; *Coung*, 18 F.3d 1132.

What is the Usual Course of Professional Practice?

■ "There are no specific guidelines concerning what is required to support a conclusion that an accused acted outside the usual course of professional practice. Rather, the courts must engage in a case-by-case analysis of evidence to determine whether a reasonable inference of guilt may be drawn from specific facts." *Singh*, at 1187, quoting *August*, 984 F.2d 705, 713 (6th Cir. 1992), and *Cuong*, at 1137-38, ■ A physician must act in a good faith manner that is in direct accordance with the reasonableness standard set forth in the medical community. *Boettjer*, 569 F.2d 1078, 1080-82 (9th Cir.

1978). ■ A physician must use reasonableness and sound medical discretion in following generally accepted medical guidelines in the administration of correct-medical treatment throughout the physician/patient relationship. *Moore*, 423 U.S. at 139. ■ Licensed physicians who prescribe controlled substances outside bounds of their professional medical practice are subject to prosecution and are no different from large scale drug dealers. **Comprehensive Drug Abuse Prevention Act of 1974, § 401(a), 21 U.S.C.A. § 841(a).** ■ The indictment need not charge that the dispensation was done outside the course of professional practice, *Steele*, 147 F.3d 1316 (11th Cir. 1998) (en banc), citing 2l/885(a)(l), because the government does not have to negate any exemption or exception set forth in Title 21 in the indictment). ■ The better practice, however, is to include this language to familiarize the jury with the concept and make clear your basis for the illegal dispensation and distribution charges. *Roya*, 574 F.2d 386 (7th Cir. 1978).

Deliberate Ignorance/Willful Blindness

■ The government may show knowledge by proof that the physician or pharmacist deliberately closed his or her eyes to the true nature of a prescription. *Lawson*, 682 F.2d 480 (4th Cir. 1982) (pharmacist charged with illegal distribution of controlled substances); *Neville*, 82 F.3d 750, 759-60 (7th Cir. 1996). ■ "When a pharmacist is faced with a large number of prescriptions all written by one doctor and all presented by one person, this constitutes evidence that the prescriptions are not legitimate." *Lawson*, at 482, citing *Hayes*, 595 F.2d 258, 260 (5th Cir.

1979); *see also Milicia*, 769 F. Supp. at 884. ■ "[U]niform dosages and quantities belied any conclusion that the prescriptions . . . were ordered *for individual patients*." 682 F.2d at 482-83 & n6 (discussing expert testimony that uniformity of prescriptions should signal to a pharmacist that the prescriptions were not legitimate). ■The nature of the physician's practice does not match the nature of the prescriptions (proving outside the course of professional practice and lack of legitimate medical purpose). 682 F.2d at 482-83 (giving the example of Dilaudid being used only for those people with excruciating pain, such as with a doctor operating a clinic that treats terminally ill cancer patients). ■ The *Lawson* court held that the evidence proved the defendant pharmacist "willingly ignored every signal that he should question the volume of controlled substances being dispensed from his pharmacies." Id. & n.17, citing *Seelig*, 622 F.2d 207, 213 (6th Cir. 1980) (jury instructions). ■ **Others:** Prescriptions written on a large-scale basis (i.e., over 90% of the prescriptions written by the physician were for controlled substances, a, figure expert testimony will show is outrageously high and dramatically out of line with professional medical practices of other similarly-situated physicians). *Hammond*, 781 F.2d 1536 (11th Cir. 1986). ■ **Consider a pharmacist** expert witness, and have them testify that "pharmacists are not allowed to fill every prescription issued by a licensed physician and they must screen their patients for 'drug-seeking' behaviors." *Sims-Robertson*, 16 F.3d 1223, 1994 WL 12212 (6th Cir. (Mich.) (Unpublished). ■ **See the DEA Pharmacist's Manual** (on their web-site). See also *Leal*, 75 F.3d 219 (6th Cir. 1996) (pill mill case, defendant

pharmacist, and "ostrich" instruction approved); *Veal*, 985 (6th Cir. 1994).

Dispense or Distribute or Both?

■ **The case law is not always clear about whether the act of prescribing or filling controlled substances without a legitimate medical purpose and outside the course of professional practice is Illegal Dispensing or Distribution or Both.** ■Here are a few cases illustrating different charging theories. ■**PRESCRIBING:** "Improperly issuing a prescription for a controlled substance is sufficient to warrant a conviction under the [CSA] ***even though the doctor does not himself actually distribute the drugs and even though the prescription is not subsequently filled***. The sheer number of prescriptions written to any individual is proof that the defendant knew he was ***prescribing drugs improperly***. *Cuong*, 18 F.3d at 1139, quoting *Stump*, 735 F.2d 273, 275-76 (7th Cir. 1984). ■ **DISPENSING:** "A doctor's authority to prescribe controlled substances is violated when he uses that authority to assist another in maintaining a drug habit ***or when he dispenses controlled substances for other than a legitimate medical purpose***. *Singh*. ■ **DISTRIBUTION:** The indictment was not defective because the government charged the defendant with illegal distribution instead of illegal dispensation. *Ellzey*, 527 F.2d 1306 (6th Cir. 1976). ■ **BOTH:** In *Green*, 511 F.2d 1062 (7th Cir. 1975), a physician was charged and convicted of illegal dispensation and a pharmacist was charged and convicted of illegal distribution. In *Hoffman*,

129 F.3d 1196 (11th Cir. 1997), the plea agreement charged both illegal dispensing and distribution. In *Sutherland*, 2001 WL 1502913 (W.D. Va.), the jury convicted the defendant of 427 counts of ***unlawfully dispensing and distributing controlled substances***. In *Dunbar*, 614 F.2d 39, 41 (5th Cir. 1980), the court said "a licensed medical doctor can be prosecuted for the distribution or dispensation of Schedule II controlled substances outside the usual course of professional practice, citing *Moore*, 423 U.S.122. ■ **The "Go-Figure" Winners are:** "[t]o convict a physician of distributing a controlled substance . . ., the government must prove . . . that the defendant 'distributed or dispensed a controlled substance.'" *Singh*, 54 F.3d at 1186-87, quoting *Cuong*, 18 F.3d at 1141; *see also Chin*, 795 F.2d at 499 (diet pill doc). ■**REAL DISTINCTION?:** Read *Harrison*, 651, F.2d 353 (5th Cir. 1981); *Thompson*, 624 F.2d 740 (5th Cir. 1980); and *Leigh*, 487 F.2d 206 (5th Cir. 1976). ■ **SOLUTION?:** Read ***Moore*, 423 U.S. 122**. You cannot create a hyper-technical distinction between dispense and distribute as both involve delivery. *Fellman*, 549 F.2d 181, 182 (10th Cir. 1977); *see also Badia*, 490 F.2d 296 (1st Cir. 1973); *Rosenburg*, 515 F.2d 190 (9th Cir. 1975).

Unit of Prosecution

■ The unit of prosecution is each act of dispensation or distribution (each prescription written or filled). *Sugar*, 606 F. Supp. 1134 (S.D.N.Y. 1985); *Elliott*, 849 F.2d 886 (4th Cir. 1988).

Death or Serious Bodily Injury

■ If you have evidence of patient overdoses resulting from the physician's prescribing pattern, consider charging the enhances penalty provisions under 21/841(b). There are *Apprendi* issues here.

Expert Witness Issues

■ "Neither the government nor the defendant is required to provide expert testimony on the issue of whether the actions taken by the defendant were or were not for a legitimate medical purpose or in the usual course of professional practice." *Polito*, 111 F.3d 132, 1997 WL 178879, *5 (6th Cir. (Ohio)), quoting *Word*, 806 F.2d 658, 663 (6th Cir. 1993). ■ "There are cases in which the lay testimony is so clear that no expert testimony is required to determine that the defendant's actions were not for a legitimate medical purpose nor in the usual course of professional practice." *Polito* quoting *Word*. ■ Many cases are not that clear cut because the target physician or pharmacist may also have legitimate patients or fill legitimate prescriptions. ■ **Potential Areas of Expert Testimony:** Signs of addiction and how a physician discovers them. The effects of all of the drugs prescribed, and their proper uses overall, the legal requirements for issuing a prescription, and the inappropriateness of the prescriptions in each § 841 count. The danger of long-term use of narcotic analgesics, which contain acetaminophen, and their toxic nature to the human body. The process of titrating narcotic dosages upward as the body adjusts and develops tolerance to them, and why

you do not prescribe high dosages to a patient that is not opioid-tolerant. The distinctions in treating acute, malignant, and chronic, non-malignant pain patients, and the distinctions between abuse, addiction, dependance, and tolerance. Poly-pharmacy or prescribing specific drug combinations – when to and when not to. This is important because many pill docs prescribe in cocktail fashion, i.e., hydrocodone, soma, oxycodone, and Xanax. Note: pain is subjective and requires a specific treatment plan for each patient. This is important because the bad doctors prescribe the same drugs in the same amounts to all or most of their patients, including patients within the same family. Use. a pain specialist to review medical files and provide opinion testimony concerning legitimate medical use of opioid therapy without other non-invasive or invasive therapies. Make sure your expert has reviewed pharmaceutical literature re: drugs at issue and prescribes these drugs in his/her practice. Determine whether your expert has served on the drug manufacturer's speakers' bureau.

Sample Count Table

■ Consider using the following table to set out each substantive dispensation or distribution count in your indictment:

Count	Date	Controlled Substance, Schedule & Form	Number of Pills	Strength

1	7/8/01	Amphetamine (S-II) Adderall®	90	30mg
2	7/10/01	Oxycodone (S-II) OxyContin®	90	40mg
3	7/11/01	Hydrocodone (S-III) Norco®	180	10mg

Sentencing Issues for Pill Cases

■ **Equivalency ratios are used in determining drug weight for sentencing purposes in pill cases.** Thus, "to determine the base offense level, the probation officer [will use] the drug equivalency tables to convert oxycodone, [amphetamine, and hydrocodone] into an equivalent marihuana weight." *Sutherland*, 2001 WL 1502913, *3, discussing sentencing on Schedule II oxycodone and amphetamine. See **OxyContin Sentencing Table**. ■ The "guidelines do not differentiate between oxycodone and its salts," so the whole weight of the pill counts. *Sutherland*, citing the guidelines and *Soto*, 1 F.3d 920, 922-23 (9th Cir. 1993). ■ **A defendant's special training as a doctor constitutes a special skill used in the commission of [drug diversion] offenses. Same with a pharmacist.** *Sutherland*.

Further Guidance

■ For further guidance on these issues contact the authors:

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PRESCRIPTION DRUG DIVERSION PROSECUTIONS -
QUICK REFERENCE CARD
OCTOBER 2002

APPENDIX F[6]

EXCERPTS OF RECORD IN SUPPORT OF MOTION FOR NEW TRIAL

August 13, 2001

Yesterday 4 of my letters to you got sent back cause my mom put this address on it. I could have got thrown in the hole for that shit. So I got them here & I'll give them to you when I get out or when you do cause it looks like the D.A., wants me to do a year up state. But my P.D. is gonna try to get me in RIPADS and bootcamp [sic] instead.

January 31, 2002

I'm doing OK right now, other than worrying constantly of whether I'm going to jail or not.

* * * * *

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[6]This compilation of excerpts of Jennifer Riggle's letters to Barron Shelton was filed as an attachment to Dr. Rottschaefer's Motion for New Trial, and appears in the Supplemental Appendix filed in the Third Circuit at App. 1000-1029. It is repeated here exactly as it appears in the Supplemental Appendix.

The letters in their entirety were also filed as an attachment (titled Master Exhibit) to Dr. Rottschaefer's Motion for New Trial, and appear in the Supplemental Appendix at App. 1035-1655.

I never fall for lines that guys might say like "I think you're real special" but I believe you and I always though [sic] for you, but you had some serious problems with drugs, and you knew I did too and I could be very vulnerable at times, but I tried to keep my morals but drugs will take over anything. Now I am a better person, and the thing you saw in the paper, well I'd rather explain in person too. So write me back & tell me when you're getting out and where this place is you're at.

February 12, 2002

I had to quit hanging around you and talking to you all together cause I was already on probation and pending charges (D.U.I.) And my mom threatened to throw me out in the middle of winter. She didn't really know that much about you, no she did know cause that ass Tony called & told her a bunch of shit. Anyways, about 2 yrs.[sic] ago I got my 2nd D.U.I & something else so I did some time in Armstrong C. Jail. * * * After I got out of jail I went to Arc Manor and after that I moved from Lower Burrell to Kittanning. I followed up with out-patient but I still went to the bars & etc. Tell you more details later.

* * * * *

I'll tell you the disasterous [sic] part in my next letter but now things are a lot better as far as me being a good mom cause I'm not using drugs anymore. I go to the Discovery House everyday for methadone. I'm just really scared about going to jail soon. Only because they have been

lenient with me too many times in Westmoreland Co. I don't even know who my P.O. is over there, but I've already violated my probation I don't even know how many times.

March 14, 2002

I just got out of Forbes Hospital tonight. I think I'm done with the hospital shit for awhile. I accidently took an overdose last Friday. I'll explain to you when you get out. * * * That's what my mom wants and she wants me to start weening [sic] off the methadone. I want to too. I'm so sick of having to rely on a drug everyday just so I'm not sick. I'm on 170 mg. That's a really high dose.

March 29, 2002

There's some things I need to talk to someone other than Michelle about that I really need to vent about. You know what I mean? I'm even half afraid to write these things down on paper, cause I'm afraid someone might see. Call me paranoid or something. [Address on envelope is 30 Timber Lane, Trafford, PA 15085. In a letter dated April 7, 2002, Ms. Riggle identified this address as Michelle's house.]

April 25, 2002

By the way I am officially back at my mom's but on one condition, I have to go to a rehab for at least 30 days and Kim, my counciler [sic] finally found a place in Philadelphia that takes people on high doses of meth.

* * * *

My brother & the rest of the family want me to go to a half-way house for like 10 months. My cousin (the one that picked us up that time& took us to sheets) just called to see what I was going to do and every time someone from my family calls I start crying and I just wish they would leave me alone about getting off the methadone cause Im not ready and no one understand that it is saving my life right now. Right now there is some real potent dope out there and if I weren't on meth I'd probably be dead. A lot of people I know have been dying because they shoot their usual amount & they die. Just writing about it is making me want it but thank God that I know I wouldn't even feel it.

May 3, 2002

I'm finally in Philladelphia [sic] at that rehab I told you about.

* * * * *

P.S. New Address L2
111 North 49th St.
Philidelphia [sic], PA 19139

July 26, 2002

Hi Sweetie, guess where I'm at? The chamber. I am sorry that I haven't written, I've been fucked up. I am so done with the shit now, I am serious babe. My prelim is 7-29

they'll probably put me to death. I have 12 counts of felony. I'm really screwed. I just talked to your mom the other night & she said you're supposed to get out within a month or 2 and I was just thinking about seeing you soon and now look at it. I just asked a counciler [sic] if you could come see me & as soon as I mentioned your name he was like nope he's been here. So then I tried to say we were married but shit he aint [sic] stupid.

July 28, 2002

Tomorrow's my hearing, I'm so nervous. I think that bitch that was in on us selling pills is talkin [sic] shit on me cause she ain't doing no time.

July 29, 2002

Well babe things went real shity [sic] this morning. They want to give me 2-4 for each charge, that could be 10-20 yrs.[sic] My PD said I'll probably have to sit here for a couple months & he's gonna try to get me back in rehab. You have to come see me. Maybe you could use someone else's ID. Please try hard. You should have seen that undercover cop today, he wouldn't even look at me, so I stuck my middle finger up my nose at him. That's probably why I am still here. I know he saw it. What a dick! He shaved his head bawld [sic], he probably thinks nobody would recognize him.

August 1, 2002

Listen for that time I didn't write you, you know I was really messed up on shit. You know how it is, you can't talk or write to anyone important. But now I promise I'm here & I hope you are too. I finally saw the Dr. today, he gave me resperidol & something else. You would not believe what I told him to get that, I wanted Kinapin but you have to have seizures. I am really ashamed of what I told him, your [sic] gonna think I'm crazy when I tell you. (note that the address on the envelope is 2119-02, 3000 South Grande Blvd., Greensburg, PA 15601.)

August 3, 2002

I finally wrote to my mom & Casey. I won't be able to see Casey for 10 wks. I have to take parenting classes. I aint [sic] trying to see my daughter through some glass window, ya know? Anyways, I told my mom not to let Casey go to Paul's (my dad) cause I told her (now this aint [sic] true) that Judge Franzi knows about my dad's stash & if she's out there when they investige [sic], she'll go to foster care. I hope she listens.

* * * * *

You know if I have to do some time I'd rather be up state. I'm sure there's more to do up there.
So you wanta [sic] know what I told the Dr.? Please don't think I'm crazy. I told him I was hearing voices. And he said "what are they telling you"? And I said with a complete straight face "He's saying he wants to butcher

my insides out & roast them up for dinner." As I'm writing this I'm laughing. You probably think I'm phsycotic [sic]. Don't worry I'm not. That poor old man, he didn't know what to do with me. So of course I prayed to God to forgive me on that one.

August 19, 2002

Last time we had sex we were too fucked up to know any better and frankly I never want to remember it that way.

* * * * *

So I go on Wed [sic]. for my bond reduction hearing. Even if they go down to $50.000 that's still $5,000 that no one has. I'm just hoping for the best. Anything can happen. I would just like to go home for a little bit to see Casey & maybe talk to you. Sorry but this is the only paper I had besides my charges. Besides it's a cool picture.

August 21, 2002

I went to my bond-reduction hearing today & it went horrible like I knew it would, but when I got back there was a letter from you & it turned my whole day completely around.

August 23, 2002

But I am trying to find every which way to get bailed out just for a minute, but no one will do it. Oh by the way I have 5 charges cause I sold 5 times and I'm gonna have 8

violations, so that's why I want out just for a minute cause I will be here for awhile. * * * So I'm requesting another bonds reduction hear [*sic*] & my mom better say that I can live there cause it's ½ [sic] my house & last time she said I couldn't.

August 24, 2002

My memory's so bad. That's cause I was always high before. But from now on I'll remember everything. * * * Casey could probably pass as your daughter with your dark features and all & you'll probably be out before me so we could say she's your's [sic] so you could write & come visit legally. There's no father listed on her birth certificate cause her dad's an ass so they would definately [sic] believe it. We'll just say that you've come back into our lives again. So what do you think babe?

August 27, 2002

So I never did tell you how I got here. Well I got off the streets in East Liberty & went to someone's house in Baldwin, called dad & tried to go there (I was stupidly drunk) but he wouldn't have it, he somehow got the number & called the next day to get the address (to send me money) then that night, bang, bang, bang, my stupid ass answered the door & there they were. That's why I am so mad at him, but in a way I don't blame hin cause I almost got killed out there.

August 31, 2002

I got your letter today. I'm so frustrated but at the same time you got me excided [sic]. Next Dec. isn't that far away it just seems like it. And I'm hoping I'm out by then too. 8 violations is no joke. They might not run it concurrent.

September 1, 2002

I probably already asked you about these things before but you know as well as I that I was too fucked up at the time. I'm sorry about lying about being clean. But you know for sure now that I am now.

September 2, 2002

Listen I have a question about my case. I think they want to subpeaned [sic] me to a grand jury about the doctor I was seeing. They're saying he was bribing patients with sex for pills, but it never happened to me. DEA said they will cut my time for a good testimony. I don't want to be a snitch but what should I do? Everyone else is testifying against. him. Please don't let nobody see this. The asking cause I trust your judgement the most. No one else knows about it & I'm scared.

September 3, 2002

My P.D. is Scott Butar. A lot [sic] of people say he's good but I'm still sitting. I guess they can only do so much at once, especially when they're not paid. Sometimes I'd be

wanting to tell him I'll pay him. If someones [sic] gonna be paid it better be a real att.[sic]

September 3, 2002 [second letter with this date]

Also, I was supposed to be on probation for I think 2 yrs. But now they're violating me on 2 or 3 charges for not doing TASC. And I have 5 new charges that they will violate me for if I'm convicted. If nothing happens with these violations (yeah right) then I'll be off prob.[sic] next yr. [sic] sometime I think. I am also worried about Alleghany Co. for the time you saw me in the paper (the 1st time). If that goes through, I'll get my liscence [sic] back Nov. 2003 if nothing then this yr. [sic]. which I doubt & only if I pay off probation in Armstrong.

September 5, 2002

Does your mom know what I did to get here? I'm worried that she won't like me cause of what I've done. Anybody would be judgmental of that. Like you said to me. I will prove myself to her and show her I will be a good woman to you. You asked "what does my mom think of me being here?" Well she's not exactly happy but she's definately [sic] more at ease knowing I'm safe. And as far as my case, she can't say anything cause she was there when I did it. She doesn't condone what I did, but she knew I had to pay my share of the rent somehow. That's the sad part of it. Most of the money went to bills, not drugs. Either way it's not worth it.

September 9, 2002

My att.[sic] is trying to get me Ripads & yeah I want to do that.

* * * * *

Don't worry babe, I will get checked by the Doctor. I didn't use no needle since the last time I was checked.

September 15, 2002

So anyways, I go to court in Oct.[sic] sometime for my formal arraignment. I really hope they offer me RIPADS and you win your appeal so we can finally be together again. Everyone's telling me not to do RIPADS, it's too hard & I'll flunk out. But what they don't understand is that I have a little girl that's depending on me to be her mother. I want to stay clean now more than ever.

September 20, 2002

Even if I get RIPADS, I still have these other violations that might hold me here. I'm starting to get real nervous about my hearing. I do have yet to find out when my hearing is. I'm gonna ask the councel [sic] if I have any detainers. Just pray for me please. I'm sure you're nervous as hell about your appeal. Honey, I'll pray for you too. OK?

* * * * *

Then I started thinking when am I going to be able to be a real mom to Casey? When she's 7 or even 3, that's too far away. I'll admit it I'm so scare [sic] & I want so bad for things to happen now. For us, for Casey. I don't mean to complain like this, but I think the drugs are finally all out of me & now I'm a fucking emotion train wreck. Did reality stomp you in the ass like this too? I mean what if they deny me RIPADS? Then what, I think I'll probably go insane.

* * * * *

I got 2 courtdates [sic] for my revocation because I didn't do my CRN eval. One's for Oct. 17th & the 23rd. They're in front of Blakovic & McCormick. I'm worried about McCormick he can be a real jerk. I wonder if he goes to church.

September 22, 2002

I did good on the coffee yesterday. I only had 2 cups I didn't need any. I have like 3 bags left. People owed me them for giving them my pills, but I got to be careful cause somebody got caught with one in her mouth & she went to the hole.

September 25, 2002

Honey, earlier in my letter I said "I will only take prescription drugs" well I want to change that. I will only take non-narcotic drugs. I think you may know that before I went to Philly I was addicted to Xanax real bad

so let's put it this way, I would rather be dope sick. Not literally, but my habit was very bad. Let me just tell you babe. God is working real good in our lives. I went to court unexpected today in Springdale. You know about me driving under suspension & all that good stuff. Well, the judge said "Did you do your 90 days?" I said "No" he said "well it says here you did," I said "OK we'll leave it at that then right?" So then he said "you did 60 days at UCP? I said "yeah & I went to rehab twice" he said "I want you to do 30 days for the $947.50 you owe. You can do it in WCP unless you're released then you have to go to Allegheny. So I am so relieved that that's taken care of. I really thought I'd have to go to Allegheny, but no, again God works in mysterious ways, huh? I just hope and pray that everything in this county goes as smoothly as that one. I guess some other lucky person did my time for me maybe, but then again I guess that all would equal 90 days.

* * * * *

So have you heard the latest? Well besides I love you I'm labeled as a snitch now. People think I went to the U.S. Marshals today. I forgot to tell you about 3 wks.[sic] ago they picked me up & then we got ½ [sic] way out the driveway & they said to take me back. Remember I told you about the Doctor well I still want your advice but sweetheart you know I tell you everything and the last thing I am in this world is a snitch.

September 26, 2002

I received 5 certified letters today and my formal arraignment is tomorrow! I can't believe it, things are coming into order fast. But I am nervous as hell. They're also going to consolodate [sic] all my cases into one. Sorry sweety I have no more paper left.

September 27, 2002

OK, so now seriously, I don't think I told you why I got kicked out of rehab in Philly. Did Michelle tell you? Well I'll tell you. I kept breaking little rules as usual, they kept writing me up so finally my insurance wouldn't pay for no more. My mom wouldn't let me come home, so she bought me a bus ticket to Pitts. I went & stayed at a shelter downtown. I met a girl who smoked a lot of crack so you know what happened there. Auk. After I was there we both got kicked out for not coming in by 10:00. So I was in New Ken for a wk. [sic], getting high of course, not that I'm proud of that. Then I decided to go back to St. Francis to detox off of Meth. I got kicked out of the clinic too. So after the hospital, I went to Pyramid in Wilkinsburg, terrible place for rehab. Stayed for 10 days, left & you know what I did & ended up here.

September 28, 2002

You probably noticed when I was writing you before I came in here, my thoughts weren't clear & too fucked up but now each day my thoughts get clearer & clearer. I know that's from being clean.

September 29, 2002

I can't believe it's the end of the month already. When I was talking to Chris last night I was telling him what my P.O. is aiming for as far as my plea and after I got done telling him I waited for him to respond & I had to say "Are you there?" Cause I told him I might have to do a yr [sic] and he didn't know what to say. I don't think he realized I could be in here that long.

September 30, 2002

Oh the guy that set me up is Jeff McGuff, he's upstair [sic] on C. But when I went to court with this guy I sent a message with him, but nothing stupid to get myself in trouble. I thought about doing something crazy to him, but he'll get his another way. He set up enough people to fill an army so somebody's bound to do something dirty to that dirty ass motherfucker. But it was my own stupidity what I did. I've seen so many people get set up, I should've known better, but I needed money so bad that I just took a risk & I'd worry about it later. But Linda & I knew there was something fishy. That stupid bitch let herself be survalanced [sic] at McDonald's & she was even set up before so she knew how those assholes worked.

* * * * *

Honey, I want you to know that when I was home before I would've sent you money but I wasn't working or selling no more & I was barely able to pay my mom rent let alone

buy Casey things. That's one thing, I don't ever want to have to live off the government anymore so when I do get out, I am getting a job, for sure.

October 2, 2002

Honey I'm pretty sure you told me your age but I'm sorry that I don't remember. I was taking one too many drugs at that time, but as of July 25, 2002 I will remember everything you tell me.

October 6, 2002

I have yet to find out about my case. Everyone's says it takes a while. I would just really like to be home for xmas [sic]. To see Casey's eyes light up when Santa comes. I wish we both could be home for her. Who knows, maybe it will happen like that we just have to stay strong & keep the faith. (Note there are two letters dated October 6, 2002)

October 8, 2002

I'm sorry, but this is all the paper I have to write on till Fri.[sic] You wouldn't believe the girls coming in here left & right from New Ken. They're the same ones that bought from the same dealer as me that wk. [sic] I was in New Ken. I wondered when it would be their turn. This girl, Janelle Houser, came back the other night after being out for only 2 wks. Prior to that she was here for 13 mos! I think this is home to some people. Well not to me.

October 9, 2002

Well sweety, there's something I've been wanting to tell you. I'm scared, but I know I can tell you anything. OK here goes. When I went to East Lib. I was hurting for money real bad so I could just say "Fuck the Bullshit" & go home to my mom & cee cee [sic]. I didn't care what she had to say about it. So I met this dud, sweety I'm sorry if this hurts you but I feel it in my heart that you should know. Anyways he offered me $50.00 to fuck him & the sad thing is I did. Well I don't know to this day whether it was his or my fault. But the motherfucker wouldn't get off of me, for like ½ [sic] hr.[sic] I was screaming for him to get off me. So then finally I just built up the courage & kicked him completely off the bed. I couldn't believe my own strength, so after that he let me go but I was so ashamed I smoked all my money up & obviously I didn't make it home.

* * * * *

I am very ashamed that I put my body up for sale like that, but I didn't really think I had any other options. But when I was picked up, deep down I was relieved to get away from the game.

October 14, 2002

So just 2 days & a wake up I go to court. I am so scared. I believe that they'll give me time served for my violation. Then I do in front of McCormick on the 23rd. My mom should be at both. I asked her to bring Casey. I just

want her to see my face & know that I'm alright. Ya [sic] know? But it will be hard cause I won't even get to give her a hug. I might just do it anyway, fuck it. They can hold me in contempt cause if I don't, she'll think mommy don't love her.

October 17, 2002

I had court today for my violation & he sentenced me to 30 days to 23 mos. Cause I should be there anyway. Fuck! Don't say that too loud! I go back on the 23rd for another one. I hope it goes as well. So two more step [sic] & I can marry my boyfriend. HA HA! Still didn't find out what the hell is up with my arraignment. That's the scariest one.

October 19, 2002

Truthfully, I think you might be home first, unless I get RIPADS. How long did it take them to pick Heather up from jail after she was sentenced? Sometimes it takes a while.

October 21, 2002

I just saw my P.O. & he said he talked to the D.E.A today & they definately [sic] want me to testify. I told them the story before, but I didn't think they believed me. But they will probably come see me again before the trial. I am shaking right now. So he said he is gonna try to get me to testify in the next month or so, so I can be home for Christmas. He said they will probably give me time

served since I been here 3 mos. I asked him about RIPADS & he said "Fuck RIPADS." At my arraignment the state or D.A., whatever wanted to give me 3 yrs. [sic] up state. Because one time when Yesko bought from me, it was in my home, & Casey was still to little to sit straight up yet & he was in a hurry, so for one second I let him hold her so I could count the money. I know that sounds really bad & I feel guilty as hell about it. I think he set me up to that too. Cause in April of this yr. C.Y.S. was called & she came to inspect, but everything's alright now cause they haven't called or shown up since. I swear on all my love, I will be a better mother to her. Sweety, your good feeling was right, God is sooo good. I just hope I don't get too nervous on the stand. He asked me if they could wire me to go into the Dr's office to try to get some more pills & see what he'd ask for. I said "hell yeah." I think that would be the easiest way instead of trying to talk in front of all these people. I wish they could've gave me RIPADS cause I am so scared I will blow it. I do remember everything I told them before. I told them before that my mind was real foggy back then cause I was on a high dose of meth & Xanax. But if this works & Lord let it be, then I can come there to marry you, honey. Then you should be home shortly afterwards. I can't even explain how excited I am. Let's just keep praying that it works.* * * I had just prayed & asked God to give me the confidence to be able to lie about the Dr. just this once. I am not a good liar & I'm scared. The only reason I'm doing it is cause he's pretty much already had & he doesn't deserve to be practicing. He has ruined many lives & some people even O.D.'d [sic] on the Oxy's. Do you think it could come back to haunt me & that was a

stupid question to ask God? Is there any exception at all to telling a lie?

October 22, 2002

I go to court tomorrow for the other violation & I just found out that I have to go on the 28th too for when I jumped out Linda's car. I had a pipe in my purse. I go in front of Bernice McCutcheon, she's really cool. Hopefully she'll give me time served. I was so stupid though. I took my purse with me when I jumped out, I didn't want to leave that shit behind.

October 23, 2002

I have a lot to tell you. Went to court, he slapped a detainer on me for that violation. He wouldn't give me 30-23 mos. Because it was an old burglary charge from when I was 19. So there's a detainer intil [sic] they see what happens with my new case, but I'll get credit for all my time.

October 29, 2002

No, Michelle don't bother with me anymore, I gave up trying to call her sorry ass. Last time I talked to her she said she was quitting the meth too, so I know what she'll go back to cause she isn't in jail or rehab & it's prcbably the hardest thing I've ever had to kick & I'm sorry to say it, but she is weaker than I am. She couldn't even stay off the shit while she was on the meth.

* * * * *

I do realize if I fuck up one more time, I am finished for about 2 or 3 yrs.[sic] At the least. No this wouldn't be my first felony. I have an old burglary from when I was 20. That's the reason why I couldn't work as a CNA again. I'm just hoping I can get my new shit totally wiped out. I didn't go to court yesterday. I failed to realize that the magistrate's office thought I was home, so I had them call for me & tell them, so I don't get another warrant.

October 30, 2002

I got more court papers today. I have a trial readiness conf. [sic] on Nov. 14th. I think if the DEA was smart they would want me to go to the Dr. office to catch him instead of having me testify because obviously, after hearing all other women testify & he's still practicing they still can't nab him. You know what I'm saying? So I think that'd [sic] be their best move.

November 1, 2002

Can you tell I had some coffee today? I couldn't buy any, but some woman gave me some shit for you know what ~ P's. I'm careful though.

* * * * *

But I'm telling you I have not talked to no one since you wrote me in here. OK? Before I got a letter from you, I

really thought that you had it with me for being out there & I knew you knew what I was doing. You're not stupid you know how the game goes. But thank God, I was wrong about you.

November 2, 2002

Baby, you know if I was with you, I would have never even wanted to sell those pills. Plus, it's kinda sad to say, but I would've never got on the meth because you had connections, while my dealer went to jail & so if I still had gone to that Dr., I would've done all those pills up myself or with you. But reguardless [sic] of that, I wouldn't have sold anything, especially behind your back because I know you wouldn't have allowed it. So just know this, I have learned one hell of a lesson, possibly the hardest way and when we're together, you never have to worry about me doing anything that stupid again.

November 4, 2002

Today I called got called to go to the magistrates. You know for the paraphenalia [sic]. They said I had 3 stems & a sm.[sic] amount on me. I couldn't remember what it was. So I waived it & they're putting it together with my new case. So if I testify, which I am, then everything will be wiped out. On the 14th of this month I will find out what's really going on * * * So you know what? I'm not bragging, but I've been clean for 100 days, today. And yes it feels good to be clean. I can go to bed knowing that I didn't hurt anyone or myself today & I can wake up with a clear mind without being hung over or dope sick.

November 5, 2002

Sweety, I don't know how, but I don't have any tracks either. Thank God. When you first got clean, did you ever look at a vein & say something like "Hmm, that looks prickable"? My urges are going away slowly, but surely. I always keep in mind how sick I was just 2 mos.[sic] ago. I'll never touch that shit again, any of it, for that matter. I remember talking to you from Michelle's, but because of the meth, will you tell me what we talked about. I'm sorry, babe, but see we had coke that night & I remember saying I wanted to wait till after I talked to you to do it. Maybe if I had done it first, I'd remember. Did I tell you I loved you yet? I did love you.

November 9, 2002

So I have 4 more days & I should know then what's going on. People are telling me if I did 3 yrs.[sic] upstate then I only have to do ⅓ of that, which is only a year. But I want to be home now, I don't care what I gotta do, I will make it happen because my husband & our daugher [sic] need me. Plus I need to see a relyable [sic] dentist. Last night, I bit on a jolly rancher & a big piece of my back molar fell out. It's the size of a rice crispy! The filling's been gone & this just added more pain. The tooth is razor sharp now.

November 12, 2002

Hey sweety, I slept all day yesterday & night cause my dumbass [sic] almost got caught withholding my meds, so

now I have to take them. I hate it cause all I wanna do is sleep & I walk around like a lost soul. I only need them for bedtime. I might quit taking them.

* * * * *

People are saying that because the election is over, they are gonna start letting people go. I'm getting real nervous about Thursday. At least this time I won't be in yellow. Honey, if I do have to stay, you can come visit when you're out. I know you're [sic] say "no, I am coming to marry you, bitch." That too. Don't worry I didn't tell my mom about the Doctor. I just told her there's a chance I might come home around Christmas.

* * * * *

Honey all I want for Christmas is to be able to be with you & Casey. You may not be home, but I want to at least be able to come visit you. And bring your daughter up to see her daddy.

November 14, 2002

Court went well today. My P.O. came down to tell me what was going on, but I didn't go in front of the judge. I'll do that on Dec. 2nd for status trial. The D.E.A. will come see me any day now to see if I'm a good candidate to go to the Dr.'s office & to testify. That makes me nervous cause I am a bad liar. Honey, I hope you believe that I didn't do anything with that Doctor cause I didn't. I would tell you, I tell you everything else. So if I meet

their criteria, then they might give me 12 to 18 mos., which is 6 mos. Or they could give me probation, either way I should be home by the end of Jan. I'm sort of wishing they would've gave me RIPADS cause I think that's what I need. And plus, I wouldn't have all this stress about the Dr.

* * * * *

He & my mom asked me what happened today & I told them & everyone here that I got RIPADS. I really wish I would've got that. I asked my P.O. which would get me home faster & he said the doctor business would.

November 15, 2002

I used to belong to the credit union in LB cause my mom belongs. But I cleared both my savings & checking out when I was getting high. And my credit is worthless.

November 22, 2002

Hi sweety, those dudes from you know what came to see me today. They might put me in front of the J the first wk. of Dec. So far, they're only offering me 12 to 18. Listen, those other letters I wrote shit in about the doctor, will you please burn them or scribble those parts out that I talked about it? I am worried something might happen & you never know what could happen. You know what I mean?

* * * * *

I used to think some of my problems were traumatizing until I heard things from you. Honey, I decided that when I go to the federal courthouse to testify, I am telling them that I won't testify unless they drop my time down a lot cause I might as well take 3-6 up state & I'll only have to do a yr. & ½ [sic]. What do you think. Those guys told me that my testimony could put that doctor in jail for a long time. I told them a good story. Make sure you scribble this part of the letter out. OK.

November 23, 2002

What do you mean you got the Motrin off your dresser? Just say it, no one reads our shit. If they did, our letters would've been stopped long ago.

November 28, 2002

But who knows, you might be coming to see me if things don't go well for me. Do you think they will come down on their offer if I tell them I won't testify? When I go to court Mon. [sic] I will tell them I'll even do RIPADS if they let me go home like within a month.

December 2, 2002

Well, I didn't go to court today. I had the feeling I wouldn't. Today is when my att.[sic] said I'd go, so I don't know what the dilleo [sic] is with that.

* * * * *

I talked to my step mom tonight. I finally asked them to send me money. She said they will on Fri.[sic] My dad is calling my att.[sic] tomorrow to tell him I agree to testify if they lower my time. I had to tell her cause he would've found out by my att. [sic] anyhow. I didn't tell her everything, nothing about the sex part. See, the doctor is still in the wrong for not wanting to see Xrays [sic] of my back before prescribing those pills. All he did was have me bend over to feel my spine & just by that he decided I was in a lot of pain. So there is a lot that they're after. Honey, I miss you so much, I really hope I can go home soon so I can come marry you. But then again, you just might be home before me. If I do get 12 to 18 or 11½, whatever, right after I'm sentenced. I will file a petition for pre. So there's a chance we could be home around the same time, you feel me?

December 5, 2002

What did Michelle tell you? Probably about my overdose huh? I didn't mean to do it. I got high on Somas & blacked out & took a bunch of other meds. Honestly honey, it was an accident.

* * * * *

I guess my dad talked to my P.D. today & the dude just acted like he didn't know much about my case. He said they're offering me 12 to 18 & my state charges will be dropped. Can that be right, sweety? I mean how could I do time & have my charges dropped? I am gonna send for my discovery packet since nobody can fucking tell me

what's going on. I forgot to tell you my new P.D. is Dante Bertani. I guess he's the head of the P.D.'s. Have you heard of him? I really wish my dad would pull some money out his ass & get me a real att.[sic] He finds a way to get everything else.

December 12, 2002

Listen, when I went to court the judge said if the federal court don't come through by my Jan. court date, he will dispose of it. I am worried that it meant that they won't use the Feds for my case & they will give me the actual mandatory. So tell me what you think. I wrote John Ceraso & asked him to come talk to me. I'm just hoping that my dad will help me out & pay him. I will ask him if he'll renegotiate my plea. Plus, I need an att.[sic] who will tell me what's going on instead of leaving me in the dark. Public pretenders don't do their job. Honey, did you have a real att.[sic]? Truthfully babe, I am starting to become discouraged over this whole thing.

December 13, 2002

I am so scared right now that I'll have to do 3-6.

December 16, 2002

Oh you'll never believe what happened Sat. John Ceraso came to see me & I started telling him about the Dr. He asked who the Dr.[sic] was. I told him & he says "I can't talk to you, I represent him." But I was kind of relieved because I didn't have to explain about how my dad

couldn't pay for him. He advised me to get myself a real att.[sic] but that's a lost cause. Hopefully if the judge would dispose of the fed.[sic] court thing, maybe they'll offer me RIPADS.

December 18, 2002

This week Pam and I are totally ass out on money, but I will try my hardest to find an envelope. I will never make it upstate like this. Oh honey thank you for your advise [sic] I needed it. With all honesty, I am scared to death to go up there. But I will definately [sic] keep it to myself. Hopefully something better will happen.

December 24, 2002

The feeling of not being able to see your child's face on Christmas morning is unbearable. It hurts a lot. Hopefully real soon we will be home with our family. And I am never, I repeat, never coming back to this place again.

December 28, 2002

But anyways, after dinner they did a whole unit shakedown and I forgot that I had a Trazadone pill under my mattress (of all places!). Luckily, Cindy checked our room and I was honest with her so she let me slide this time. Honesty is definately [sic] the best policy, otherwise she would have put me <u>there</u> for lying.

January 3, 2003

I got some good new[illegible]lay. You know how I have McCormick? Well I go to court on the 21st in front of Pezze instead. I don't know how that happened, but it did. She is so much more family oriented than him. He has no sympathy for those of us that has children & she does. So now I have a better change than what I would with him.

January 10, 2003[1]

Yesterday my public defender came from the Federal Court. They are ready for me now. I got my plea in the mail too. I go to Fed. [sic] court on Jan. 17th. My plea said my sentence will be 12-18 mos. But it says I only have to do half of my standard range, plus I get time served. And I was told that they will drop the state charges & I will go to Federal prison. So that is good news but I'm not getting my hopes up because I am scared about you know what. I may have to take a polygraph. And please make sure you scratch that last sentence out. Honey I hope you can see that I am trusting you with my life right now & I always will. Oh listen to this. About 2 wks ago I had a dream that my court date was Jan. 17th & sure enough it is. Isn't that weird?

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[1] The letters dated January 7, 2002 through January 12, 2002 were contained in an enveloped postmarked January 15, 2003. The letter writer appears to be mistaken as to the year.

* * * * *

My att.[sic] told me today that there is a reasonable chance that the judge gives me time served. That's if everything goes well if you know what I mean. But like I said I am not getting my mind set on going home.

January 12, 2003

My mom came today & she gave me some hope. I have already cooperated with them & the only way I will have to testify is if he didn't sign a plea yet. I said "mom I just don't want to contradict myself" & she says "well when they ask you a question & you can't remember, just tell them it's written right on the statement, so look there." She is funny sometimes. I don't know baby, I'm just worried sick over it.

February 1, 2003

I'm in a single room now since I came back from Allegheny. I really hated it there. My att. [sic] made sure they brought me back the next day cause he didn't want me to be there. He is the shit. Federal P.D.'s actually give a shit about you. When I went to fed court the D.A. lady was so nice to me, she was the one who suggested the O.R. bond for me. We talked for a min.[sic] & I thanked her. So then, she found out I was still here & she called the county D.A. & yelled at them. Can you believe that babe? Because on Jan. 21st I went in front of Pezze for my charges to be noll [sic] pross & they continued it because they didn't have the paperwork yet

from fed court. So she & my att.[sic] are on it & he said I should get a hearing real soon. And then hopefully that day or before, McCormick will lift my detainer. But I am worried that he will decide to violate me already to my new charges since I plead [sic] guilty. Do you think he will? This whole damn situation is a bitch, if it's not one thing, it's another.

February 3, 2003

I really hope I get a hearing this month. I told my mom how McCormick might decide to violate me on my sales already & she said I've already done 6, what more could they want. I don't know what do you think about that?.

February 5, 2003

I called the P.D.'s office like 3 times today. Neither Bertani or Cechetti were in. I asked the secretary if I was listed for court & she said not yet. I am getting pissed. I know you probably say I shouldn't be complaining cause at least I'm getting out soon. But babe, it aint [sic] soon enough. I had my heart set on leaving. I just miss Casey so much. I almost feel like she's a stranger to me & I gave birth to her. But I had to go fuck it all up & leave her. I beat myself up everyday for what I've done. I don't think I can forgive myself until I am home & I'm a good mother & I'm doing the right thing. You know what I'm saying?

February 7, 2003

There's a possibility that we may be home around the same time if you get pre because my att.[sic] told me today that I have to have a revocation hearing for McCormick to lift the detainer. He said it won't be for a month or so. My lips are so chapped right now. I lost my Carmex a few days ago. Oh the Dr's [sic] name is Rottshaeffer [sic], he's from Oakmont. I read the same article about that other dude. I don't know how these Dr.'s think that they can get away with that shit. They're stupid.

* * * * *

Oh & everything you read in the paper is true except my age. And they told me if I do everything right on pre trial when I get sentenced they will give me time served. So no, I won't have to go to Fed. I'll be home free with you & Case. [sic] I am so looking forward to that.

February 17, 2003

I'm still waiting patiently for a court date, you'll be the first to know.

February 21, 2003

These places are so nerve racking, neither one of us belong here. Well maybe I do cause I did do wrong, but you definately [sic] don't.

* * * * *

Babe, I have done so many wrongful things to my gram like stealing money & jewlry [sic] that my pap gave to her & went & pawned it. I feel so terrible about it cause she still gave me everything I ever wanted, you know? I still don't know if she knows but I think she probably does. Tell me if you think I should apologize for stealing from her or if I should just leave it alone. She will never understand the disease of addiction, she is a full blown Catholic.

February 23, 2003

I got bad news yesterday. Ernie died Mon.[sic] night. I'm really upset, especially for my mom & even Casey. Casey loved her Pap Ernie so much. He was closer to her than he was his real granddaughter. The councelor [sic] let me call my mom yesterday & she was pretty upset. My att.[sic] told her the only way I could go to the funeral is if I went shackled & paid $300.00. I don't want to go like that plus she don't have the money. So I'm not going Babe. I wish you were here right now. I'm really going through it. Remember how I was telling you about my grandpap dying before I could make things right between us? Well, this is the same shit. I've done so much shit to Ernie & the last time I saw him I was all cracked out. He did so much for me, too. He was more of a father to me than my dad was & I shit on him.

February 28, 2003

Hi babe, guess what babe. I got a court date for March 26th for the revocation & the nolle pross. On that date it'll

be exactly 8 mos.[sic] since I been here. So I'm hoping that's how long McCormick wanted me to sit. But I am not getting my hopes up & setting myself up for disappointment. AGAIN!

March 7, 2003

But you're absolutely right. I need to dig myself out of this self pity mode, since I got a court date I've felt more hopeful & thanks to you also, babe. You are the one who needs to be complaining, not me. And yes, you definately [sic] are the strong minded one. See babe, the reason why I've been so down is cause you know that big secret I told you about the doctor? Well, my stupid ass told someone about it way back & I am scared to death that she will reveal it & I'd never go home. She swears she'll never tell but I can't help worrying. I know babe, that was dumber than selling those drugs & I kick myself every fucking day about it. I've always been too trusting with people. My sentencing in fed was changed from April 11th to the 4th. Babe, I swear to God, if anyone finds out my secret, I will fucking murder someone & if I'm locked up I will put a hit out for them. I fucking swear, babe! I'm so sorry I'm talking like this but I'm just so scared, ya know? This is why I need to talk to you in person so if it ever happens you can help back me up, tell me babe? I know it would never be you to reveal anything, so don't think I'm referring to you. Babe, maybe you should burn this letter to be on the safe side, please do that for me, you can't trust no one.

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I'm sorry I complain so much about being here, it's just that I could never deal with confinement & so much authority & it's so hard for me to adjust to a different type of lifestyle. It's even written in my presentence report that I have what they call "Adjustment Disorder" as well as personality disorder, whatever the fuck that means.

March 13, 200^

Yesterday, I went & testified for Lacy & she got out. But while I was talking, I was studdering [sic] & I was nervous. So I was thinking if I couldn't handle myself at a stupid board hearing how the fuck will I do it if I have to testify against the doctor? I just pray that he takes a plea so I don't have to.

March 18, 2003

But that explains why right before the seizure, that lady was buzzing around the gym acting stupid as hell. I even said to her "what the hell's wrong with you?" Cause I never saw her like that before. Babe, all these things I see & hear really makes [sic] me realize what drugs will do to someone & it's scary as fuck! Oh God babe, I just thought of something. That time when I OD'd at Michelle's, they said I just sat in the chair staring at nothing while I foamed at the mouth & the awful thing about it was Casey was right there to see it. She kept saying "mama, mama." I was petrified tonight just seeing a stranger doing that, can you imagine how Casey felt seeing her mom like that? Babe, I don't ever want to put

her or our new kids through any trauma like that ever again. I am determined to live a good happy life with you & our kids. For real babe, the drug life literally repulses me to no limit.

March 22, 2003

I had an awful dream last night. I haven't had a drug dream in a while either. I walked into this bathroom somewhere & there were 2 bags of H on top of the tampon dispenser & I grabbed them. I remember thinking God, make me throw these away, don't let me use. But I snorted them anyway. Babe, I know why I had that dream, it's cause I am so worried that I won't be able to fight off temptations out there.

~~March 23,~~ 2003

I'm also gonna tell him that my dad has a job waiting for me. He doesn't, but he told me to say that anyway.

March 26, 2003

Hi babe, well sweetheart, McCormick gave me 9-23 mos. [sic] for the burglary. He said that I'd get credit for time served but I don't know if I get credit back from July or Oct. As soon as he sentenced me they immediately cuffed me & started pulling my arm. I had the asshole, John Sweeney, who didn't know shit about me & I don't think he knew how long I've been in here. So I said to him "So how much more time is that?" he said "You have to do 4 more mos [sic]." Then I got all choked up & didn't even

think to ask him if I'd get credit back to July. My poor mom couldn't believe it, she was ready to go off.

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And all I want is to go home to Casey & my mom & be a mother again.

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For some reason the Nolle Pross hearing was continued. I don't know if they want to wait till after my sentencing on Apr. 11th or what. Baby, you need to get home as soon as possible cause I need you. If something bad goes down about the lie then I have a plan – I need you to back me up, feel me, babe? But I won't write about it unless it's absolutely necessary. The girl is Debbie Peterson, she got out on Mar.[sic] 13th. I heard she is doing good but you never know if she'll fuck up again & need something to get her out of a jam. But all I can do now babe, is pray about it & leave it in God's hands.

March 28, 2003

I wrote that ass, John Sweeney. I gave him a sob story so he'll help me. I never kissed anyone's ass before but when you break the law, you gotta do whatever it takes, right?

April 2, 2003

Hi babe, I'm sorry this won't be the longest letter but I have to get it out now so my mom gets her letter. I asked her if she'd try to talk to Debbie cause I was just told that she's going to tell on me. I don't know what else to do but have my mom try & talk to her. Babe, I'm so scared. I've been crying my eyes out for the past 3 hrs.[sic] But I will tell you this, if she brings me down then she will never get her daughter out of foster care. I have some dirt on her as well that could put her & Joe, her husband away for as long as I'm away. And that's a promise! But try not to worry, babe. I guess all we can do is fake it day by day & pray about it. Who knows. I might end up telling the feds my secret so maybe they'll go a little easier on me. Who the hell knows.

April 7, 2003

OK, before I forget, about the violation. Well it's a violation of a burglary from 97. It has nothing to do with my sales charges. I just figured it out the other night that they violated me for non payment when I was on house arrest in 2001. I completed it but didn't pay. So I'm not eligible for good time & I can't get credit back from July because from July to Oct. I was here on fed charges. The only thing I might be eligible for is credit from the time I did on house arrest, which was two mos.[sic], therefore, I might be able to get 1 mo. [sic] knocked off. I will write my att.[sic] to see. Now about my secret, I found out that Debbie isn't going to say anything, I am positive about that. She said to wait &

see if the Dr.[sic] takes a plea before I admit my secret. Which I wasn't gonna tell them I was lying, I was going to withdraw my statement & plead the 5th. I'm trying to get my att. [sic] from fed here so I can tell him, he can't say anything or I could sue the fuck out of him. So he can give me advise [sic] on what to do. Because babe, there is no way I can testify in court or take a polygraph & I'm not risking the chance of them hitting me with perjury, you feel me babe? So if it came down to it, I'd much rather do 18-24, 30-37, or 3 to 6, rather than an additional 5 yrs.[sic] I received a notice last wk.[sic] about my sentencing. It's postponed for at least 120 days & I think they want more cooperation from me. That's why I need to talk to Penn (my att) to see what the hell's going on. If the Doc [sic] takes a plea then I'm clear, if not then I'll be in for no more than, shit I'm not sure cause it all depends on if fed gives my case back to the state courts. But don't worry about it babe. Everything will be alright. Just keep praying. But I'm still waiting for them to violate me for my new charges. If they do soon, I pray that they'll give me time served. What do you think?

April 18, 2003

And listen, I don't go around bragging about my case to any motherfucker in here. A lot of people know because they knew that the marshals picked me up. And a lady that was here was involved with the same thing as me & she told our business. I did tell Debbie & I know babe, that was a big mistake.

April 28, 2003

I talked to my fed P.D. today. Pinous let me call from his office. He said he talked to Ceechetti and he told him my minimum is July 21st but their trying to let me go home in June. He thinks I should get a month credit from the house arrest I did. So that's good news, babe.

April 30, 2003

Hi babe, well my worst fear is happening. I just talked to my fed P.O. & he said the D.E.A. & the prosecutor is coming to review my statements tomorrow. He said they'll give me a copy of my last statement I made, which is good. Babe, I wish I could talk to you right now about this. So next wk [sic] on the 7th I'll be going in front of a grand jury but it's not like what you went to. It's just for the D.A. to ask me questions in front of the judge & jury so they have enough to indict him. He still may take a plea. His att.[sic] won't be there to grill me, which is good too. As long as I get a copy of my old statement I can look at it & go over it. Well, I've been thinking about all this & I decided to quit worrying & just be confident & do what I need to do to get thru it. And if the worst happens, I'll try & be prepared to do some time in fed prison. I made a huge mistake & if God wants me punished then I'll just have to accept it. I just have to leave it in God's hands. I just feel so guilty, you know. I want to do the right thing but I also want to go home to Casey & you & my mom. You know, people that don't have kids & come to jail have it made.

May 1, 2003

Hi sweety, I love you and miss you as always. I just came back from talking to those people. And it actually went pretty good. They were so nice to me & that made me feel even more guilty. But there's no turning back now, babe. I go to court next Wed. the 7th. I'll drop you a kite that night to let you know how it went. Remember how I told you that I couldn't remember my story? Well, they told me that I have one of the best memories they've seen. They could've just said that to boast me up cause I told them that back then I was in complete blackout, it's hard to remember everything. But I have faith babe that things will work out. They really want me to go home in July to be with Casey.

* * * * *

I had a dream last night that I saw the doctor & I remember feeling so guilty. I couldn't even look him in the eye. I know this next wk [sic] I'll be stressing a lot. My mom even told me last night that I shouldn't feel guilty & I'm not doing anything wrong. She told me the same thing you did, so I know it's alright. Cause who knows, if it wasn't for me (maybe) then he might have a bigger chance to keep practicing & continue to hurt other's [sic]. I'm just trying to ease my guilt a little & see the positive things about it, you know?

May 5, 2003

Oh by the way, I got a letter from my fed att.[sic] & he said that the D.A. said our meeting with the D.E.A. the other day went well & that my testimony date is changed from May 7th to May 21st. I just want to get this shit over with, you know? But I already told you that my min. is July 21st but they're trying for June. I'm testifying now, I can't go back. I'm too scared to. I will never admit to what I did.

May 6, 2003

The LT. let me go up to his office to call my mom today to tell her to bring me court clothes. She did, they better have let them in. I'm not going till the 21st but they'll be here for me. They better not let them get wrinkled. There was no way that I was going up on the stand to testify in these blues.

* * * * *

I got a letter today from my old H dealer. It shocked the hell out of me. He's an old disgusting man who said he wants some young girl in his life. He makes me sick. Baby, do not worry, I won't write him back. I have no clue as to why he'd write me, he's got tons of young girls swarming all around him for his dope. But then I got to thinking & you tell me what you think. He said if I need anything to let him know. Babe, don't be mad for thinking this way but what if I just wrote him back so he'll send me dough? It would take the burden off my

mom. I don't know, you tell me what you think, alright babe? And I'll respect & do whatever you say. I'm not a grimy person like that but the way I feel is he charged me way too much for those bags & he made a lot of money off of me so it'd just be like him paying me back.

May 8, 2003

I can't believe my mom sent you that picture. What was she thinking? I know you love me no matter what but I don't like you seeing me that way, especially being high.

May 9, 2003

I looked up the sentencing guidelines today on perjury & it's 7 yrs. for trying to defraud or injure another person. I just hope for the best, you know?

May 18, 2003

I hope to God I only have 2 more months cause I need to see you. Miss Annie brought me a thing in the paper yesterday that said my charges were dismissed & she asked why I was still here. I told her I'm doing a violation sent. Baby, I was thinking about telling you about my old dealer writing me & babe I'm sorry for telling you that. The last thing I need is any ties to my old people. I don't even know what I was thinking. I'd rather suffer a little in here than to have any contact with that man. I don't really suffer anyway. My girls buy me shit I need when I'm broke. I guess I was just being greedy & I'm sorry for even telling you that, babe.

May 23, 2003

I'm glad you got that letter they sent back. I was worried that our shit was hot, but I'll be careful from now on. I know I was being a little too careless with some things I said.

* * * * *

Babe, I respect what you say about the H dealer, you're absolutely right about that. I might run into him one day & he is definitely the type to say "Jen you owe me." Typical drug dealer, he is. The devil in disguise. Baby, please don't tell my mom that he even wrote me, it would only make her worry.

May 31, 2003

I asked about Dave Cook because some girl likes him & she wanted to know what kind of person he is. I got high with him once & he seemed alright but I heard a lot of bad shit about him too. He took my pipe "by accident," so he says. Anyway, I don't want to think about those days.

June 2, 2003

Hi babe, I finally went & testified today. It was hard but I think I did a good job. I just feel so relieved. But it's not over yet, if he doesn't take a plea, I'll have to do it again. Babe, I wish you could've seen me in my outfit. I looked sharp as hell and I looked real skinny too. It was black dress slacks & a blue & gray striped pullover &

cute black clog shoes. I didn't want to change when I got back.

June 4, 2003

I read in the paper today that they indicted the doctor on Mon., the day I testified. I call my att. [sic] & he said that's good news, I did my part. But like I said, if he doesn't take a plea I'll have to do it again.

* * * * *

You asked me how did my H dealer know I was here? Some girl that was in here must've told him. I swear, babe, I didn't write him or anything. So please don't think that, alright?

June 7, 2003

Mom came to see me on Thurs [sic]. She said the doctor was on the news. She doesn't think he has a prayer in the world for getting out of this. They want to take all his assets. I'm sure you saw it in the paper. His name is Rottschaefer. Anyway she's excited about me coming home & finally decided to tell me that she has Casey so spoiled.

* * * * *

Baby, we definitely have to get married the day you get out. I'll make sure we have the license & everything ready, okay?

June 14, 2003

Babe, one of the reasons I was upset yesterday was cause you said the Dr's [sic] taking it to trial. Did it actually say that? I have an article from the Tribune & one from Valley News & all it said was if he's convicted.

June 17, 2003

I've been so lazy babe, I don't know what's wrong with me. I've been worried a lot about you know what. I woke up every night at about 3 a.m.& while I am alsleep [sic] I have nightmares about it & in them the whole world knows my secret.

* * * * *

I got a letter from my att. [sic] today, it was just my copy of the letter he wrote to the warden for recommendation for me. It don't [sic] look like I'm getting that month credit, that's alright cause July's right around the corner.

June 20, 2003

Tomorrow is the 21st & I could've been gone if I had a decent att.[sic], I know it. Cause I know for a fact I should've been given credit. Oh well, a month aint [sic], but I just pray that's all I have left. I still worry about that thing but it's in God's hands. Babe, tell me, do you know if people usually get out on their minimum? Do they ever get held back for any reasons?

June 23, 2003

I'm supposed to get a letter from my county attorney this wk.[sic] so maybe I'll know a little more.

June 24, 2003

I signed my P. application papers today & I'll find out in 10 days if I'm going anywhere. The only thing is I have to have DNA blood work done before I can leave because my charge is burglary. But I already wrote some people so it gets done before 7-21. That's my date babe, if it's not denied.

June 26, 2003

My mom came tonight. She talked to that Pat Michaels, P.O., you know who he is right? Well he's the one that I signed my papers with. Anyway, everybody's been saying what an asshole he is. And that's just what he is too. He's trying to find any reason he can to keep me here. My mom went off on him. This fucking county is fucking ridiculous. But Pat told me he'd let me know in 10 days what's going on.

July 2, 2003

I was telling you about that Kevin Trent guy, well his name isn't Trent, it's Parent & he's an investigator from federal. I talked to him yesterday. He said he didn't say "most definitely" he's checking into it more & I have to call him back tomorrow. But he said as long as I don't get

into trouble I should go home on the 21st. I'm just nervous, babe. Something always goes wrong & things get fucked up. So you said that everybody that gets picked to work at the hosp. [sic] goes home? That's a good sign, babe. I hope you do within the next couple of months cause I need you home. And I definitely need you for when I have to testify again. I want to know what you have to tell me. Will it help with what I have to do? I know I have to wait till I see you, right?

July 4, 2003

I'm sorry that I had to stop writing last night but some shit went down & it was just a horrible night. I almost lost everything if you know what I mean. I can't really explain it to you on paper, but I'll tell you on the phone, alright? Listen, babe there is [sic] some people here (higher ups) & some of my peers who really have it in for me & they will do anything to get me hemmed up and frankly babe, I am scared to death right now. I am walking on thin ice. So I know you don't want to hear this & I hate say it, but let's stop writing until I come home. I just have this gut feeling about it. It's only a few more weeks & I just want to be on the safe side. Please understand, babe. Don't be mad at me either. I got my DNA testing today so hopefully that's a good sign. Babe, you probably don't understand how they could find out about us writing but just trust me, I know they're watching. Please babe, just try to understand, alright? Call my house on the 21st & if I'm not home my mom can tell you what's going on, okay baby? Babe, you know I love you dearly & I hate this, I really do, but I just don't

want to fuck shit up. It was my mistake for telling people where you are when they asked, but it's hard for me to lie.

October 21, 2003

Believe me, I intend to be 100% faithful to you, but after what I did with Dave, wouldn't you think that I'd do it again?

* * * * *

I'm just trying to be realistic with you & I'm just saying right now I'm not in a position to commit to you, or anyone else. I haven't spent enough time with you to commit & I'm also still searching for my own self identity. I thought I found myself when I was down but apparently I haven't yet. Worst of all babe, & I hate to tell you this but I have to. Dave & I spent a lot of time together. I didn't mean for it to happen this way but it did. I have some pretty heavy feelings for him & I try not to but I just can't help the way I feel. I was honest with you when I told you that Dave & I were thru [sic] cause we are. I know he's no good for me & he may never change or even leave his girlfriend.

* * * * *

P.S. The way I did you, I'm not worth shedding any tears over. So don't cry!

November 7, 2003

But I wanted to let you know that I'm starting to wake up & realize that I am out of control. I pray to God that you come home soon cause you out of there & I think you could help me.

February 4, 2004

I know you don't like hearing good things about Dave & I, but I have to inform you of what's really going on. He's living with us now. And we both got jobs at Visions on 3rd Ave.

* * * * *

My point is Barron, is that I am very happy & very much in love with him. Just as he is with me. Also, I'm sorry if I mislead [sic] you to think that I'm gonna push him to the side when you get out. Cause I won't do that, Barron. Yeah, he & I have had our ups and downs but things are getting a lot [sic] better for us. My mom knows <u>everything</u> we've been doing & she's willing to give us a chance to straighten out.

* * * * *

I know I said a lot [sic] of things that I wanted to accomplish & I still will do them. I refuse to be put back in a "cage." And believe it or not, but Dave won't let me either. He doesn't condone my usage and never has.

* * * * *

I know I promised to come see you but I'd have to clear it with Dave first cause we don't lie to each other. Love, Jennifer.

(2)

No. 06-151

Supreme Court, U.S.
FILED
AUG 31 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BERNARD L. ROTTSCHAEFER, M.D.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is a physician denied a fair trial in a criminal prosecution for drug distribution under 21 U.S.C. §841(a)(1) when the parties frame and argue the issues under a Government interpretation of the "legitimate medical purpose" rule of 21 C.F.R. §1306.04 that equates the criminal standard ("outside the course of professional practice") with the civil "standard of care"?

2. Has the circuit court's factors test to evaluate new trial motions under Rule 33 supplanted the language of the Rule so as to deny a new trial even when the interest of justice requires it?

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IN THE

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No. 06-151

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

The Association of American Physicians and Surgeons, Inc. ("AAPS") is a non-profit, national group of thousands of physicians founded in 1943. AAPS has many members who fear overzealous prosecution by the federal government despite complying fully with applicable state laws and otherwise engaging in the lawful practice of medicine. AAPS is

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

dedicated to defending the practice of private and ethical medicine so that physicians may best serve their patients without interference by third parties. AAPS has filed *amicus curiae* briefs in numerous cases before the United States Supreme Court and federal Courts of Appeals.

Amicus has a direct and vital interest in the issues presented to this Court based on the effect of federal interference with medical practice that is lawful under applicable state regulation.

SUMMARY OF ARGUMENT

Federal prosecutors are increasingly encroaching on the state regulation of medicine, in violation of principles of federalism. The prosecution below of Dr. Bernard Rottschaefer, a respected general practitioner who occasionally treated pain, disrupted the delicate federal-state balance by supplanting the regulatory scheme of a state with an uninformed federal jury's view of the proper standard of care. Medical practice, including the treatment of pain, is fully regulated by the states but federal prosecutions are increasingly intruding into the state domain. This Court should grant Dr. Rottschaefer's Petition and limit federal prosecutions to their proper role.

Petitioner Dr. Rottschaefer's practice was typical of thousands nationwide. He practiced medicine in the Commonwealth of Pennsylvania, in good standing with the Pennsylvania State Board of Medicine. Though the learned and experienced medical board allowed Petitioner to practice, a federal prosecutor untrained in medicine did not. The federal government could have revoked Petitioner's ability to prescribe controlled substances, or it could have complained to the Pennsylvania State Board of Medicine and thereby permitted an educated review of the facts. Instead, the federal prosecutor presented a spiced-up tale of sex-for-drugs for a lay jury in procuring a guilty verdict.

The sex-for-drugs story was a complete lie. Seventy-two (72) detailed letters were written during the prosecution by the government's key witness, Jennifer Riggle, to her then-boyfriend, and they were not made available to the defense until after the conviction. In 22 of those letters, Riggle explained contemporaneously how her false testimony would enable her to receive reduced sentences for drug-related crimes. Riggle wrote, "They're saying he was bribing patients with sex for pills, but it never happened to me. DEA said they will cut my time for a good testimony. I don't want to be a snitch but what should I do?" Pet. App. 44a. Other drug abusers, who knew Riggle and each other, likewise testified to the sex-for-drugs story.

This case illustrates why trained medical boards, not lay juries, are the appropriate entity for reviewing care provided by physicians. Yet this prosecution, and an increasing number like it, reflect usurpation by the federal government of state regulation of the practice of medicine.

Almost every physician who legitimately treats pain, even if only occasionally, could be targeted, indicted and unjustly convicted by federal prosecutors in a similar manner. Physicians rely on the state regulatory system to define the parameters of treating pain in patients. Trained review panels, not a lay jury of untrained citizens, are essential to the process. Allowing and affirming convictions like that below transforms medical care into a field regulated by federal prosecutors rather than by the States.

Rule 33 of the Federal Rules of Criminal Procedure, as written, supports overturning this conviction on the grounds that the sex-for-drugs testimony was utterly false. But Rule 33 was not applied below as written. Instead, it has been replaced by a judicially created test that impedes overturning a conviction based on discovery of false testimony if it can be described as merely cumulative. At trial, Petitioner knew that the sex-for-drugs tale was false and attempted to challenge it,

but lacked the evidence of the letters. Yet without even holding a hearing to consider the letters, the trial judge denied Petitioner's motion for a new trial, and the appellate court below upheld this find on the basis that the evidence of perjury by the key witness was "merely cumulative or impeaching." *United States v. Rottschaefer*, 2006 U.S. App. LEXIS 10504, *9 (3d Cir. Apr. 27, 2006). Such distinction is nowhere to be found in Rule 33 itself.

John Tierney of the New York Times commented on this case:

> The agents and prosecutors are supposed to be experts at detecting liars, and they had far better investigative tools available to them than Rottschaefer did. Yet they apparently weren't careful enough or shrewd enough to see through Riggle's story. If they don't deserve prison time for that mistake, neither does her doctor.

John Tierney, "Sex, Lies and OxyContin," N.Y. Times A5 (Jan. 24, 2006). Yet the trammeling of federalism and use of perjured testimony in order to convict resulted in a gross injustice for the good doctor, and over-deterrence for many like him.

ARGUMENT

I. THIS AND SIMILAR FEDERAL PROSECUTIONS OF PHYSICIANS VIOLATE FEDERALISM BY INTERFERING WITH THE STATE REGULATION OF MEDICINE.

The prosecution below reflects a growing trend, unlikely to be fixed without this Court's intervention, to empower federal juries to dictate the medical standard of care. This violates federalism and contravenes holdings of this Court. "Obviously, direct control of medical practice in the States is beyond the power of the Federal Government." *United States v. Linder*, 268 U.S. 5, 18 (1925).

States, not federal juries, regulate the practice of medicine. States, not the federal government, supervise the practice of medicine. This was reiterated most recently by the Supreme Court in *Gonzales v. Oregon*. "The Government, in the end, maintains that the prescription requirement delegates to a single executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality. **The text and structure of the [federal law] show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it.**" *Gonzales v. Oregon*, 126 S. Ct. 904, 925 (2006) (emphasis added).

But that unconstitutional "radical shift" in power is precisely what occurred in this prosecution of Petitioner Bernard Rottschaefer, M.D., and an increasing number of similar prosecutions.[2] A "single executive officer"—a federal prosecutor—usurped the power of an entire state medical board and regulatory system by indicting a physician for practicing medicine in a manner of which the federal prosecutor disapproved. All physicians are deeply influenced and deterred by such a prosecution, and they alter their own practices to avoid meeting the same dire fate. With respect to the subject matter of the prosecution, the occasional treatment of pain, the state medical board becomes a nullity by virtue of the decision of a "single executive officer."

This "radical shift" is not repaired by virtue of a jury passing judgment on the physician's conduct and deciding that he acted with "no legitimate medical reason." *Rottschaefer*, 2006 U.S. App. LEXIS 10504, *6. Review of a physician's medical judgment is within the domain of the state medical board rather than a jury untrained in medicine. A prosecu-

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[2] Petitioner cites many similar prosecutions in his Petition before this Court. *See Rottschaefer Petition for a Writ of Certiorari* at 19-20.

tor's indictment of one physician inevitably frightens other physicians away, even though they practice medicine with the full approval of the state regulatory system.

State courts, in contrast with federal courts, have recognized the inappropriateness of submitting a medical dispute to a jury as a criminal case. For example, Dr. Stan Naramore administered large quantities of painkillers to two patients who subsequently died, and he was then convicted of murder by a jury. On appeal, the Supreme Court of Kansas observed that "the jury apparently found, beyond a reasonable doubt, that Dr. Naramore's actions were totally outside appropriate medical practice." *State v. Naramore*, 25 Kan. App. 2d 302, 322 (1998). "Having found that, [the jury] then apparently found there was no reasonable doubt that the source of his actions was homicidal intent." *Id.* Yet the Supreme Court of Kansas properly overturned the conviction. It found that where, as in the trial of Petitioner Rottschaefer below, there is a bona fide dispute in the medical community, then reasonable doubt about criminal intent exists as a matter of law. "[T]here is a reason why there has yet to be in Anglo-American law an affirmed conviction of a physician for homicide arising out of medical treatment based on such highly controverted expert evidence as here." *Id.*

A jury is even less "suited to be 'the Nation's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards'" than a court is. *Stenberg v. Carhart*, 530 U.S. 914, 968 (2000) (Kennedy, J., dissenting) (quoting *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 456 (1983) (O'Connor, J.)).

By intent and effect, the actions of the federal government in this type of prosecution completely supersede and interfere with the authority of the state medical boards. These prosecutions violate well-established principles of federalism because they "alter the 'usual constitutional balance between the States and the Federal Government.'" *Gregory v. Ashcroft*,

501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). "[I]t is incumbent upon the federal courts to be certain of Congress' intent" before infringing on the state regulation of medicine. *Id.* (quotation marks and citation omitted).

This Court, in *United States v. Morrison*, invalidated federal interference in "criminal law enforcement . . . where States historically have been sovereign." 529 U.S. 598, 613 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)). *See also Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) ("This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."); *United States v. Bass*, 404 U.S. 336, 349 (1971) ("Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").

Physicians treating pain, as Petitioner occasionally did, would now be well-advised to seek approval for their practices from the local federal prosecutor rather than the state medical board. This plainly violates "the federal-state balance" without congressional mandate. *Bass*, 404 U.S. at 349. *See also Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 2222 (2005) (O'Connor, J., dissenting) ("The Constitution, we said, does not tolerate reasoning that would 'convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.'") (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)).

The federal government retains full authority to revoke a DEA registration that is being misused by any physician, in sharp contrast to the conviction upheld by this Court in *United States v. Moore*, 423 U.S. 122 (1975). In *Moore*, the federal remedy of revocation of his DEA registration was *not* an option because "[r]egistration was mandatory for practitioners with state licenses" except under inapplicable excep-

tions. *Id.* at 138 n.15. In this case, the DEA could have ended at any time the ability of Petitioner to prescribe controlled substances simply by terminating his registration. That would accomplish legitimate federal goals while respecting federalism.

In sum, the decision below eviscerated the state's traditional control and regulation of physicians under its jurisdiction. Congress never authorized such a complete disregard of state oversight of medical practice, an area in which "States lay claim by right of history and expertise." *Gonzales v. Raich*, 125 S. Ct. at 2224 (O'Connor, J., dissenting) (quoting *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring)). The importance of the federalism issue at stake supports granting the Petition for *Writ of Certiorari* here.

II. REVIEW IS NECESSARY TO CLARIFY THE PROPER STANDARD FOR A NEW TRIAL BASED ON PERJURY.

Integrity in prosecutions has eroded due to the inability to obtain a new trial even where, as here, perjury of a highly prejudicial nature is uncovered and demonstrated post-trial. *See, e.g.*, Brian Murray and Joseph C. Rosa, "He Lies, You Die: Criminal Trials, Truth, Perjury, and Fairness," 27 *N.E. J. on Crim. & Civ. Con.* 1 (Winter 2001). The judicial permissiveness towards prosecutorial perjury stands in stark contrast to the exclusionary rule, which flatly prohibits the use at trial of much evidence improperly seized. *See Weeks v. United States*, 232 U.S. 383, 392 (1914). It seems ironic that while the truth is excluded, falsehoods are allowed.

Rule 33(a) of the Federal Rules of Criminal Procedure provides that a new trial may be granted upon defendant's motion "if the interest of justice so requires." The post-conviction revelation that the defendant did not give drugs for sex after all, which was the explosive testimony exploited by

the government to procure the conviction, should easily satisfy this express requirement of Rule 33(a).

The court below mistakenly held that "cumulative or impeaching" evidence does not trigger a new trial under Rule 33(a). *Rottschaefer*, 2006 U.S. App. LEXIS 10504, *9. Yet as explained by the Seventh Circuit, "Nothing in the text or history of Rule 33, or of the cognate civil rule (Rule 60(b)), supports a categorical distinction between types of evidence; and we cannot see the sense of such a distinction." *United States v. Taglia*, 922 F.2d 413, 415 (7th Cir.), *cert. denied*, 500 U.S. 927 (1991).

A. There is Heightened Urgency to Deter Perjury in Criminal Trials in Light of the Increasingly Permissive and Conflicting Standards.

Appellate courts are besieged with convictions procured by perjury, yet have only conflicting standards to apply. The First Circuit, for example, has encountered perjury by prosecution in at least three different cases in the past seven years. *See United States v. Gonzales-Gonzales*, 258 F.3d 16 (1st Cir. 2001); *United States v. Josleyn*, 206 F.3d 144 (1st Cir. 2000); *United States v. Huddleston*, 194 F.3d 214 (1st Cir. 1999).

Amid the uncertainty in the proper standard, perjury runs amok. The Fourth Circuit has faced an epidemic of perjury in prosecutions challenged on appeal, including at least five appellate cases in the last seven years on this issue. *See United States v. Maynard*, 77 Fed. Appx. 183 (4th Cir. 2003); *United States v. King*, 71 Fed. Appx. 192 (4th Cir. 2003); *United States v. Gullett*, 62 Fed. Appx. 554 (4th Cir.), *cert. denied*, 540 U.S. 995 (2003); *United States v. Roberts*, 262 F.3d 286 (4th Cir. 2001), *cert. denied*, 535 U.S. 991 (2002); *United States v. McGrady*, 1999 U.S. App. LEXIS 2395 (4th Cir.), *cert. denied*, 528 U.S. 855 (1999). In *King*, the perjury was so overwhelming that "in thirty years of practice and ten on

the bench, [the trial judge] had never had 'less confidence' in a verdict." 71 Fed. Appx. at 194.

The permissive approach towards perjury allows it to grow like a cancer amid the confusion about the proper standard. The Fifth Circuit struggled with the uncertainty to conclude only that it "arguably" adheres to the same probability standard for evidence of perjury as with other newly-discovered post-trial evidence. *United States v. Nixon*, 881 F.2d 1305, 1311 (5th Cir. 1989). Seventeen years later, the standard is even murkier. In the absence of a clear rule as a bulwark against the use of perjury by prosecutions, false testimony will spread further.

B. The Decision Below Conflicts with Rulings of This Court.

The decision below permitting a conviction to stand despite perjury by a key government witness conflicts with this Court's rejection of prosecutorial deception in an analogous situation. *Banks v. Dretke*, 540 U.S. 668 (2004). There the defendants suffered from the concealment of exculpatory *Brady* material and perjured testimony by government witnesses, and sought relief on that basis. The Court reiterated its holding in *Kyles v. Whitley* that "the materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at 698 (quoting *Kyles*, 514 U.S. 419, 435 (1995)). Surely the revelation that the sex-for-drugs claim of the key witness was a lie does cast this whole case in "a different light."

The burden of proof does not shift to the defendant to prove his innocence. "'A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.'" *Banks*, 540 U.S. at 698-99 (quoting *Kyles*, 514 U.S. at 434-435). *See also Fahy v. Connecticut*, 375 U.S. 85,

86-87 (1963) ("We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of **might have** contributed to the conviction.") (emphasis added).

This Court "has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added, citations omitted). That knowledge should be imputed to prosecutors where, as here, the falsity of the testimony should have been known by the prosecutorial team. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437. The plea bargain below induced the government's star witness to tell the sensational lie of sex-for-drugs. As John Tierney of the New York Times put it, "The agents and prosecutors are supposed to be experts at detecting liars, and they had far better investigative tools available to them than Rottschaefer did. . . . If they don't deserve prison time for that mistake, neither does her doctor." John Tierney, "Sex, Lies and OxyContin," N.Y. Times A5 (Jan. 24, 2006).

Where, as here, the deception is by a star witness for the prosecution, it is "inescapable" that a new trial is warranted. *See Giglio v. United States*, 405 U.S. 150, 153-54 (1972) ("[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice'" and "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor") (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). Defendants have a right to acquittal if there is

reasonable doubt on any element of a criminal charge, and prosecutorial use of perjury to obtain a conviction impermissibly infringes on this right. *See* U.S. CONST., AMEND. V.

CONCLUSION

This Court should grant the Petition for *Writ of Certiorari*.

Respectfully submitted,

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August 31, 2006